CONTENTS.

Page.

STATEMENT OF THE CASE 1–9

ARGUMENT 10–68

I.

The evidence establishes an agreement or combination between the defendant retailers to prevent wholesalers from selling directly to consumers by refusing to buy from (boycotting) them if they do 10

1. The declared purpose of the defendant associations as shown by their constitutions and by-laws 14
2. The compilation and circulation of the so-called "official reports" or blacklists .....
3. The actual course of conduct of defendants in concertedly withdrawing their patronage from listed wholesalers 18
4. Admissions of members of defendant associations, and other testimony showing general recognition of and obedience to a tacit or moral obligation upon members so to withdraw their patronage 21
5. The inference of an agreement to boycott is confirmed by the decisions of other courts in conspiracy cases 34

Com. v. *McLean*, 2 Pars. (Pa.), 367.
3 *Greenleaf on Ev.*, sec. 93.
Patnode v. *Westenhaver*, 114 Wis., 460.
Regina v. *Murphy*, 8 C. & P., 397.
Reilley v. *United States*, 106 Fed., 896.
State v. *Adams Lumber Co.*, 81 Neb., 392.
United States v. *Sacia*, 2 Fed., 754.
Webb v. *Drake*, 26 So. (La.), 791.
2 *Wharton Criminal Law*, sec. 1398.

ARGUMENT—Continued.

II.

Page.

An agreement or combination by retailers to refuse to buy from (boycott) wholesalers who sell directly to consumers interferes with the free and normal flow of trade and therefore violates the antitrust act 41

Bailey v. *Master Plumbers' Ass'n*, 103 Tenn., 99.
Beck v. *Railway Teamsters' Union*, 42 L. R. A., 407.
Bohn Mfg. Co. v. *Hollis*, 54 Minn., 223.
Boutwell v. *Marr*, 71 Vt., 1.
Brown & Allen v. *Jacobs Phar. Co.*, 115 Ga., 429.
Casey v. *Cincinnati Typographical Union*, 45 Fed., 135.
Doremus v. *Hennesy*, 176 Ill., 608.
Ellis v. *Inman*, 131 Fed., 183.
Gompers v. *Buck Stove & Range Co.*, 221 U. S., 418.
Same v. *Same*, 33 App. D. C., 83.
Grenada Lumber Co. v. *Mississippi*, 217 U. S., 433.
Hawarden v. *Youghiogheny Coal Co.*, 111 Wis., 545.
Hopkins v. *Oxley Stave Co.*, 83 Fed., 912.
Jackson v. *Stanfield*, 137 Ind., 592.
Klingel's Pharmacy v. *Sharp*, 104 Md., 218.
Loewe v. *Lawlor*, 208 U. S., 274.
Lucke v. *Clothing Cutters' & Trimmers Ass'n*, 77 Md., 396.
Macauley Bros. v. *Tierney*, 19 R. I., 255.
Montgomery Ward & Co. v. *So. Dak. Merchants' Ass'n.*, 150 Fed., 413.
Montague v. *Lowry*, 193 U. S., 38.
Olive v. *Van Patten*, 7 Tex. Civ. App., 630.
Purington v. *Hinchliff*, 219 Ill., 159.
Retail Dealers' Ass'n. v. *State*, 48 So. (Miss.), 1021.
State v. *Adams Lumber Co.*, 81 Neb., 393.
Steers v. *United States*, 192 Fed., 1.
Thomas v. *C., N. O. & T. P. R. Co.*, 62 Fed., 803.
Webb v. *Drake*, 26 So. (La.), 791.

ARGUMENT.—Continued.

III.

Page.

Viewing the agreement or combination between the defendants merely as one to circulate amongst themselves lists of wholesalers who sell directly to consumers, it unreasonably restricts competition between wholesalers and retailers in selling to consumers and therefore violates the antitrust act 55

American Tobacco Co. v. *United States*, 221 U. S., 106.

Nash v. *United States*, 229 U. S., 373.

Quinn v. *Leatham*, (1901) A. C., 495.

Standard Oil Co. v. *United States*, 221 U. S., 1.

IV.

The plea that this combination was a reasonable and necessary measure to defend the position of retailers in the trade is irrelevant in law and unfounded in fact .. 64

Chesapeake & Ohio Fuel Co. v. *United States*, 115 Fed., 610.

Grenada Lumber Co. v. *Mississippi*, 217 U. S., 433.

Loewe v. *Lawlor*, 187 Fed., 522.

CASES CITED.

Page

American Tobacco Co. v. *United States*, 221 U. S., 106 ..... 51, 58, 63
Bailey v. *Master Plumbers' Ass'n*, 103 Tenn., 99 48
Beck v. *Railway Teamsters' Union*, 42 L. R. A. (Mich.), 407 49
Bohn Mfg. Co. v. *Hollis*, 54 Minn., 223 ..... 47, 49
Boutwell v. *Marr*, 71 Vt., 1 48
Brown & Allen v. *Jacobs Phar. Co.*, 115 Ga., 429 ..... 48, 54
Casey v. *Cincinnati Typographical Union*, 45 Fed., 135 48
Chesapeake & Ohio Fuel Co. v. *United States*, 115 Fed., 610 65
Com. v. *McLean*, 2 Pars. (Pa.), 367 37
Doremus v. *Hennesy*, 176 Ill., 608 48
Ellis v. *Inman*, 131 Fed., 183 43
Gompers v. *Buck Stove & Range Co.*, 221 U. S., 418 ..... 42, 52
Same v. *Same*, 33 App. D. C., 83 43
3 *Greenleaf on Ev.*, sec. 93 37
Grenada Lumber Co. v. *Mississippi*, 217 U. S., 433 ..... 46, 49, 52, 64, 68
Hawarden v. *Youghiogheny Coal Co.*, 111 Wis., 545 48
Hopkins v. *Oxley Stave Co.*, 85 Fed., 912 48
In re Debs, 158 U. S., 564 9
In re Grossman, 175 Ill., 425 9
Jackson v. *Stanfield*, 137 Ind., 592 47
Klingel's Pharmacy v. *Sharp*, 104 Md., 218 48
Loewe v. *Lawlor*, 208 U. S., 274 ..... 42, 49, 53
Same v. *Same*, 187 Fed., 522 64
Lucke v. *Clothing Cutters' & Trimmers Ass'n*, 77 Md., 396 48
McClung v. *Selliman*, 6 Wheat., 598 9
Macauley Bros. v. *Tierney*, 19 R. I., 255 ..... 49, 50
Marvin v. *Universal Life Ins. Co.*, 85 N. Y., 278 9
Moffatt v. *Smith*, 101 Fed., 771 9
Montgomery Ward & Co. v. *So. Dak. Merchants' Ass'n*, 150 Fed., 413 ..... 49, 50

Page.

Montague v. *Lowry*, 193 U. S., 38 ..... 43, 53
Nash v. *United States*, 229 U. S., 373 ..... 57, 58
Olive v. *Van Patten*, 7 Texas Civ. App., 630 47
Patnode v. *Westenhaver*, 114 Wis., 460 38
Purington v. *Hinchliff*, 219 Ill., 159 48
Quinn v. *Leatham*, (1901) A. C., 495 61
Regina v. *Murphy*, 8 C. & P., 397 36
Reilley v. *United States*, 106 Fed., 896 40
Retail Dealers' Association v. *State*, 48 So. (Miss.), 1021 ..... 43, 51
Standard Oil Co. v. *United States*, 221 U. S., 1 58
State v. *Adams Lumber Co.*, 81 Neb., 392 ..... 34, 43, 52
Steers v. *United States*, 192 Fed., 1 53
Thomas v. *C., N. O. & T. P. R. Co.*, 62 Fed., 803 48
United States v. *American Tobacco Co.*, 221 U. S., 106 ..... 57, 58, 63
United States v. *Reading Co.*, 226 U. S., 370 58
United States v. *Sacia*, 2 Fed., 754 40
Webb v. *Drake*, 26 So. (La.) 791 48
2 *Wharton Criminal Law*, sec. 1396 37

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 511.

THE EASTERN STATES RETAIL LUMBER DEALERS' ASSOCIATION ET AL., APPELLANTS,

v.

THE UNITED STATES.

No. 550.

WILLIAM C. MCBRIDE, INDIVIDUALLY AND AS PRESIDENT OF THE RETAIL LUMBERMEN'S ASSOCIATION OF PHILADELPHIA, ET AL., APPELLANTS,

v.

THE UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals from the final decree of the United States District Court for the Southern District of New York in a proceeding brought by the United

States under the antitrust act (26 Stat., 209) to enjoin a combination of retail lumber dealers formed for the purpose of preventing wholesalers from selling directly to consumers.

The defendants are:

The New York Lumber Trade Association, a membership corporation of New York, composed chiefly of retail and wholesale lumber dealers in New York City and in the portion of Hudson County, N. J., east of the Hackensack River, which is commercially tributary to New York City (Pet., 1 R., 24; Ans., 1 R., 141);

The Building Material Men's Association of Westchester County, a membership corporation of New York, composed chiefly of retail lumber dealers in Westchester County, N. Y., adjacent to New York City (Pet., 1 R., 29; Ans., 1 R., 144);

The officers, directors, and representatives of the New Jersey Lumbermen's Protective Association, an unincorporated body, composed chiefly of retail lumber dealers in New Jersey (Pet., 1 R., 26; Ans., 1 R., 143);

The officers, directors, and representatives of the Retail Lumbermen's Association of Philadelphia, an unincorporated body, composed of retail lumber dealers in Philadelphia and vicinity in the State of Pennsylvania (Pet., 1 R., 30; Ans., 1 R., 181);

The Massachusetts Retail Lumber Dealers' Association, a membership corporation of Massachusetts, composed chiefly of retail lumber dealers in that State (Pet., 1 R., 32; Ans., 1 R., 147);

The Lumber Dealers' Association of Connecticut, a membership corporation of Connecticut, composed chiefly of retail lumber dealers in that State (Pet., 1 R., 31; Ans., 1 R., 146);

The Lumber Dealers' Association of the State of Rhode Island, a membership corporation of Rhode Island, composed chiefly of retail lumber dealers in that State (Pet., 1 R., 34; Ans., 1 R., 148);

The Retail Lumbermen's Association of Baltimore, Md., a membership corporation of Maryland, composed of retail lumber dealers in Baltimore (Pet., 1 R., 36; Ans., 1 R., 149);

The officers and representatives of the Lumber Exchange of the District of Columbia, an unincorporated body, composed of retail and wholesale lumber dealers in said District (Pet., 1 R., 35);

The Eastern States Retail Lumber Dealers' Association, a membership corporation of New York, composed of three representatives, one of whom is the secretary, of each of the other associations above named (Pet., 1 R., 19; Ans., 1 R., 139; Ex. No. 1, 4 R., 24 et seq.; 5 R., 237, 238; 6 R., 348); and

The officers and directors of the incorporated associations above named.

Persons engaged in the lumber trade generally have been classified as (a) millmen or manufacturers, (b) wholesalers, or (c) retailers. (Anderson, 2 R., 170.)

Consumers consist of (a) those engaged generally in construction and repair work on an extensive scale; (b) those engaged locally in small building, repair and construction work; (c) railroads and large

producing and manufacturing corporations requiring lumber in large quantities for special purposes; (d) manufacturers who elaborate the sawed lumber into furniture and "trim" such as moldings, frames, sash, doors and blinds, and into boxes and containers; and (e) the Federal Government and in some instances State and municipal governments. (Findings of court, 1 R., 3.)

The millmen take the logs from the forests and saw them into lumber of various sizes and dimensions. Usually they are located where the timber is grown and therefore are widely scattered, since the several species of timber grow in different parts of the country. As a rule a single millman saws only one or two kinds of lumber. They sell their product either to the wholesaler or directly to the retailer or the large consumer. Some sell to but one of these classes; others sell to all three. (Anderson, 2 R., 169–171.)

Wholesalers buy from the millmen and usually are located in or near the large cities. Some of them maintain yards and carry stocks of lumber for resale (Gordon, 2 R., 334), but most of them merely transmit orders to the millman, who ships the lumber directly to the customer (Elias, 2 R., 431; Threlkeld, 3 R., 585; Perry, 3 R., 454; Bailey, 8 R., 231). In the latter case the wholesalers usually purchase the lumber, finance the shipment, carry the insurance, assume the risks in transit and extend credit to the customer (Crary, 8 R., 507), though a few do not, but simply transmit the order of the retailer for a

commission (Anderson, 2 R., 167–8; Bailey, 8 R., 233; Crary, 8 R., 506).

Some wholesalers sell only to retailers; others sell only to large consumers (Kelsey, 2 R., 390–391; Reamer, 2 R., 240; Cookman, 3 R., 323); others, wholly reputable, sell both to retailers and to large consumers (Vosburg, 2 R., 599; Salmon, 2 R., 189; Gordon, 2 R., 339; Fisher, 2 R., 484; Johnston, 2 R., 570, 581; Perry, 3 R., 450, 470, 472, 489, 490, 493, 495; Bailey, 8 R., 235; Reilly, 8 R., 9, 13, 15, 17, see also 4 R., 80.) Usually, however, a millman or a wholesaler refuses to sell directly to consumers who are also customers of a retailer who buys from him (Fisher, 2 R., 486, 491; Burns, 2 R., 370).

Retailers buy from millmen or from wholesalers for resale to builders and carpenters and to manufacturers of "trim," such as sash, blinds, doors, etc., and to other classes of consumers. (Mansfield, 9 R., 283.) In nearly every city and town they maintain yards where they carry in stock lumber of many different kinds and dimensions and from which deliveries are made in small quantities by trucks and wagons. (Mansfield, 9 R., 239; Schumaker, 9 R., 307.) At many points they also make deliveries immediately from ships and cars, and at times procure shipments from the millman or wholesaler directly to customers at a distance from their yards, in the same manner and at the same prices as in sales by wholesalers. (Findings of court, 1 R., 3; Swayze, 2 R., 232; Vosburg, 2 R., 599; Coale, 3 R., 148;

Clark, 3 R., 177; Bailey, 8 R., 262; Threlkeld, 3 R., 585; Davis, 9 R., 57; Maule, 10 R., 240.)

There has long been friction between the wholesaler and the retailer growing out of the alleged invasion by each of the trade province of the other. The former has claimed the right to sell to any person buying at one time carload or shipload lots of the same sort of lumber. The latter, on the other hand, has insisted upon the right to supply all consumers irrespective of the quantity purchased by them. (Threlkeld, 2 R., 213; Sheldon, 2 R., 133–134; Milne, 2 R., 159; Salmon, 2 R., 185; Swayze, 2 R., 232; Elias, 2 R., 460, 469; Wheeler, 2 R., 542; Johnston, 2 R., 573.) The retailer, indeed, endeavors to sell lumber anywhere he can find a market and in any quantity. (Coale, 3 R., 148, 156; Bailey, 8 R., 263; Perry, 3 R., 470, 579, 580; Davis, 9 R., 57.)

The natural customer of the retailer is the local builder, who requires either many different kinds and sizes of lumber in small lots or particular kinds and sizes for immediate use, or both. (Finding of court, 1 R., 3.) The millman and wholesaler have not sought to sell to this class of consumers since to do so would require facilities for quick deliveries and knowledge of local credits which it would be impracticable for them to have. (Mansfield, 9 R., 243; Dawless, 9 R., 296; Strock, 2 R., 254.)

On the other hand, in the territory covered by the defendant associations are many consumers whose requirements are sufficiently large to make it practicable and profitable for millmen and wholesalers

to sell to them. Accordingly there is a natural flow of trade between these classes of consumers and the millmen and wholesalers. (Threlkeld, 2 R., 207; 3 R., 585; 5 R., 586; Strock, 2 R., 245; Fisher, 2 R., 484; Willson, 2 R., 501; Vosburg, 2 R., 584; Babcock, 2 R., 602; Whitmer, 3 R., 125; Coale, 3 R., 148; Clark, 3 R., 163; Gebhard, 3 R., 602; Bullard, 3. R, 65.)

The petition charges that the retailers composing the defendant associations have agreed or combined to prevent wholesalers from selling directly to consumers by blacklisting them and refusing to buy from them if they do, and by other specified means. (Pet., 1 R., 14–17; 56–61.)

The commerce affected and, as the Government contends, restrained by the defendant associations is of two sorts, (1) between wholesalers and consumers and (2) between wholesalers and retailers. The lumber itself grows in many different States. It is bought by the wholesalers at the mills which saw it, and (since wholesalers seldom have yards) is shipped directly from the mills to the consumers or the retailers in different States. Indeed it would hardly state the case too strongly to say that nearly all of the sales by wholesalers in the territory here involved require shipments across State lines for their consummation.

This is alleged in the petition (1 R., 9–13), admitted by the answers (1 R., 134, 179), testified to by many witnesses (Swayze, 2 R., 226; Reamer, 2 R., 240; Byrne, 2 R., 293; Elias, 2 R., 431; Wheeler,

2 R., 554; Johnston, 2 R., 556; Bullard, 3 R., 40; Brewster, 3 R., 67; Clark, 3 R., 164; Lawrence, 3 R., 263; Peterson, 3 R., 330; Grogan, 3 R., 335; James, 3 R., 348), and conceded in the appellants' briefs. (Brief No. 511, p. 27–30; Brief No. 550, p. 4.)

All the defendants joined in one answer (1 R., 117), excepting the officers, directors, and representatives of the Retail Lumbermen's Association of Philadelphia, who answered separately (1 R., 177), and the officers and representatives of the Lumber Exchange of the District of Columbia, who defaulted (2 R., 2). The answers admit the circulation by and amongst the defendants of lists called "official reports" containing the names of wholesalers who sell directly to consumers (1 R., 131, 181), but otherwise generally deny the vital allegations of the petition.

The case was heard by a court constituted of four circuit judges pursuant to the Expedition Act of February 11, 1903 (32 Stat., 823). They unanimously adjudged the defendants parties to a combination in restraint of interstate trade and commerce and enjoined them from circulating amongst themselves the so-called "official reports" or blacklists containing the names of wholesalers selling directly to consumers, by means of which the object of the combination; namely, to prevent wholesalers from selling to consumers in competition with retailers, was being effected. (Decree, 1 R., 5.) They also found that the other means of effecting the object complained of in the petition had been abandoned before the suit was brought. (Opinion, 1 R., 1.)

All of the defendants except the Lumber Exchange of the District of Columbia, which did not answer, have appealed. (1 R., 20.) The Retail Lumbermen's Association of Philadelphia appealed separately. (1 R., 34.)

The court in its opinion based its decree that defendants are parties to a combination in restraint of trade on the ground that the circulation by and amongst them of the so-called blacklists, necessarily tending as it did to cause them not to buy from the listed wholesalers, had the effect of coercing wholesalers into refraining from selling to consumers, thereby restricting competition between retailers and wholesalers in selling to consumers.

We shall also endeavor to sustain the decree on the ground that the record discloses an agreement or combination by the defendant retailers to boycott (i. e., concertedly refuse to buy from) wholesalers who sell to consumers, thereby interfering with the free and normal flow of trade.

A decree may be supported in an appellate court not only on the particular ground pointed out by the trial court, but on any other ground appearing in the record. "The question before an appellate court is," said this court in *McClung* v. *Silliman* (6 Wheat., 598, 603), "Was the judgment correct, not the ground on which the judgment professes to proceed?" (p.603). (See, also, *In re Debs*, 158 U. S., 564; *Moffatt* v. *Smith*, 101 Fed., 771, C. C. A., 8th Cir.; *Marvin* v. *Universal Life Ins. Co.*, 85 N. Y., 278, 284; *In re Grossman*, 175 Ill., 425.)

THE ARGUMENT.

I.

THE EVIDENCE ESTABLISHES AN AGREEMENT OR COMBINATION BETWEEN THE DEFENDANT RETAILERS TO PREVENT WHOLESALERS FROM SELLING DIRECTLY TO CONSUMERS BY REFUSING TO BUY FROM (BOYCOTTING) THEM IF THEY DO.

Throughout the case there has been a determined effort on the part of the defendant associations to create the impression that the entire cooperative purpose ended with the circulation amongst them of lists of the names of offending wholesalers. This the Government denies, contending that the circulation of the lists was but the basis and signal for a boycott, which was the true and principal object, to which the circulation of the lists was merely incidental.

On this point the Government might well rest its case upon the following deliberate admission in the brief of appellants in No. 511:

> It was and is conceded by defendants and the court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of course, the very object of the defendants in circulating them. (Br. No. 511, p. 4.)

Here is an express concession that the "*very object*" of the associations was to cause their members "*to withhold patronage from listed concerns*," i. e., to boycott them, and that the circulation of the lists "*would have a natural tendency*" to accomplish that object. Since men are presumed to intend the natural consequences of their acts, this amounts to an admission that defendants are parties to a combination to boycott.

But aside from this admission, this proposition is established by a consideration of—

(1) The declared purposes of the defendant associations in their constitutions and by-laws.

(2) The compilation and circulation of the so-called "official reports" or blacklists.

(3) The actual course of conduct of the defendants in concertedly withdrawing their patronage from listed wholesalers.

(4) Admissions of members of defendant associations and other testimony showing the general recognition of and obedience to a tacit or "moral" obligation upon members so to withdraw their patronage.

(5) Decisions of other courts upon similar evidence.

1. The Declared Purposes of the Defendant Associations as Shown in their Constitutions and By-Laws.

The constitutions and by-laws of the defendant associations (reprinted 4 R.) in every instance show clearly enough that their principal object was to

prevent sales by wholesale lumber dealers to consumers. The following excerpts are illustrative:

New Jersey Association:

Constitution, Article II.—To Protect Trade Rights.

> It shall have for its object the protection of its members against the solicitation of orders, the distributing of price lists, or making of sales by wholesale dealers and manufacturers to consumers, through the diffusion of all legal and proper information to its members, and the giving of such other protection as may be within the limits of cooperative associations. (4 R., 177.)

Philadelphia Association:

Declaration of Purpose (Preamble to Articles of Association).

> We realize the convenience, if not necessity, of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business.
>
> * * * * *
>
> We also recognize the disastrous consequences which result to the legitimate retail lumber dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists.
>
> And, recognizing and appreciating the advantage of cooperation in securing and disseminating any and all proper information,

for our mutual convenience, benefit or protection, we have organized this association, and have adopted the following articles for the government of our affairs. (4 R., 362.)

Westchester County Association:

Constitution and By-Laws, Article I, Section 2.

Section 2. The object of the association is to foster trade, to reform abuses in the conduct of business, to protect its members from unjust and unlawful exactions, to diffuse accurate and reliable information among its members, to procure uniformity and certainty in the custom and usages of the trade and to protect its members from unfair and unbusinesslike competition. (4 R., 429.)

Eastern States Association:

Declaration of Principles:

Whereas retail associations were organized for the purpose of retaining for the retail dealer such trade as rightfully is his; and

Whereas the trade of the carpenter and builder is trade which does exclusively belong to the retailer: therefore, be it

Resolved, That the concerns decided by the respective retail associations to be carpenters and builders, whether they own and operate yards or not, shall never be considered legitimate customers for the wholesaler to sell; and be it further

Resolved, That if the question of the arbitration of a carpenter and builder be the basis of affiliation with the N. W. L. D. A., then,

that we sever our reciprocal relations with the N. W. L. D. A. (4 R., 33).

By-Laws. Article II.—Objects.

> The objects of this association shall be to promote and foster a unity of action in all matters pertaining to the legitimate conduct of the retail lumber trade, to encourage friendly relations between the several associations whose members are members of this association, to correct abuses and irregularities from which the trade suffers, to secure and disseminate any and all proper information for the mutual convenience, benefit, or protection of its membership. (4 R., 33, 35.)

The constitutions and by-laws of the other associations contain provisions of similar purport, which may be found in the record as follows: N. Y., 4 R., 135, 148; Conn., 4 R., 403; Mass., 4 R., 352, 356; R. I., 4 R., 375, 381; 2 R., 28; Baltimore, 4 R., 421; E. S. R. L. D. S., 4 R., 31, 33, 35, 41.

2. The Compilation and Circulation of the So-Called "Official Reports" or Blacklists.

As shown above, the avowed object of the various associations was to prevent wholesalers from selling to consumers. In furtherance of this avowed object their constitutions, articles of association, or by-laws, invariably contain provisions making it the duty of each member to report to the secretary of his association all cases of such sales. It then became the secretary's duty to investigate the matter, and, in case the wholesaler refused to make a satisfactory settlement (i. e., refused to promise to discontinue

such sales in the future) to blacklist him. The following excerpt from the by-laws of the Massachusetts association is the stereotyped form:

> Whenever, and as often, as any manufacturer or wholesale dealer in timber and lumber, rough or manufactured, in any way or for any purpose, shall directly or by his agents, quote prices, solicit sales, or sell any of the stock above described to any person not a regular dealer (as contemplated in Article II of the constitution), it shall be the duty of any member of this association who has knowledge of such transaction to notify the secretary in writing, and state all the particulars possible.
>
> * * * * *
>
> It shall be the duty of the secretary at once to notify the person or persons against whom a complaint has been made, without giving the name of the person making the complaint. If the transaction complained of was made through or by an agent, or other person, the principal for whom he acted shall be considered jointly liable.
>
> When any manufacturer, wholesale dealer, agent, or any other person or persons, after having been notified of a complaint against them, and furnished with a copy of these by-laws, neglects or refuses to make satisfactory explanation to the executive committee, the secretary shall notify every member of the association of the name or names of said person or persons. When any person or persons who have been reported shall make satisfactory settlement with the executive com-

> mittee, the secretary shall notify at once all members of the association of such settlement. (4 R., 356.)

For the same or similar provisions in the constitutions of the other associations see N. J., 4 R., 184–185; N. Y., 4 R., 148; Phila., 4 R., 356; R. I., 4 R., 379; Westchester County, 4 R., 440; Conn., 4 R., 319; Baltimore, 4 R., 421.

The secretary of each local association sent the names of these wholesalers to the witness Crary, secretary of the New York association, who, acting as agent for all of the associations, compiled and printed a universal blacklist. This universal blacklist, compiled from information furnished by the secretaries of all the associations, was distributed about once a month. There is no controversy upon this point. Mr. Crary himself tells the whole story (8 R., 496–498), and both briefs concede it (Br. No. 511, p. 35–39; Br. No. 550, p. 4).

The form of the blacklist follows:

> Official Report.
>
> The Lumbermen's Ass'n of Philadelphia.
>
> Secretary's Office,
>
> 2500 South Street,
>
> Statement to members, November, 1909.
>
> You are reminded that it is because you are members of our association, and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted, or as having sold direct to the consumers:

* * * (then follow names of wholesalers) * * *

Members, upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin.

Removed Since Last Report.

As we are associated for mutual protection, we should not go into territory where our associates have yards, and sell or offer to sell lumber at a price lower than we sell it in our home territory. (4 R., 371–373.)

The "official report" reprinted above was sent to a member of the Philadelphia association. The reports sent to members of other associations were precisely the same, except that the association named at the top of the report was always that of which the recipient of the report was a member.

From May, 1900, to November, 1910, there were published in these lists the names of 244 mill men and wholesalers doing business in various States, for

quoting prices or selling to consumers. (3 R., 583–584; 7 R., 421.) The witness Crary (compiler of the lists) testified that at any one time there were about 500 wholesalers doing business in the territory covered by the defendant associations. (8 R., 514.)

The number actually blacklisted, 244, was very much less than the number reported. In a majority of cases the mere intimation that the blacklist would be resorted to was enough to bring the offending wholesaler to terms with promises to desist from selling to consumers in the future. (4 R., 205; 8 R., 345; 9 R., 254.) Volume 4 of the record is full of correspondence of this nature. See, for example, the case of Fisher & Wilson. (2 R., 486, 494; 5 R., 538.)

3. The Actual Course of Conduct of Defendants in Concertedly Withdrawing their Patronage from Listed Wholesalers.

The circulation of the blacklist was but preliminary to a concerted refusal by the retailers to deal with wholesalers whose names appeared upon it. In that refusal lay the real strength of the combination and the power of the blacklist as an instrument of coercion. Among the cases of such concerted refusal to buy from listed wholesalers are the following:

Sheldon (2 R., 121–122, 138), for selling a carload of lumber to the Painted Post Lumber Co., which never bought of retail yards (2 R., 150);

Threlkeld (2 R., 217; 3 R., 585, 595), for selling 200,000 feet of flooring to the Carlisle Realty Co. (2 R., 218, 219);

Strock (2 R., 249–250), for selling to the B. W. Smith Construction Co., builders of cotton mills, who bought

26,000,000 feet of yellow pine a year, or twice as much as any retail yard in the same locality (2 R., 256), the sale being in Rhode Island, though he was boycotted in Philadelphia also (2 R., 258);

Horace G. Hazard (2 R., 350), for selling to a company that had a retail yard and planing mill, but unknown to Hazard did contracting work also (2 R., 347);

M. M. Smith (2 R., 400–401), for selling 12 carloads of lumber to a factory (2 R., 407);

Elias (2 R., 437, 441, 445–446), who always protected the retailers to whom he sold (2 R., 444);

Wheeler (2 R., 554), for selling 20,000 feet of box lumber to the Elizabeth, N. J., Nursery Co., in a city where he sold to no retailers (2 R., 539);

Johnston (2 R., 558, 559–562; 5 R., 101), for selling to the Edison Phonograph Works (2 R., 563);

Howe (3 R., 187–188),for selling to Van Kirk, who had a planing mill and the largest retail lumber yard in Paterson, N. J. (2 R., 320), but also did contracting work, building factories, warehouses, schoolhouses, etc. (2 R., 318);

Pease (3 R., 300), for selling to Van Houton, who had a very large retail yard, but also did a small contracting business (3 R., 304), Pease's firm having sold Van Houton 168 carloads that year (3 R., 299), but after being listed for 11 days yielded and promised to sell to him no more (3 R., 297);

Cookman (3 R., 323), who was driven out of the business of selling to retail yards, and now sells to

factories and large contractors exclusively (3 R., 323, 324);

Lawrence (3 R., 274, 286), a case of boycotting by retailers who did business in other localities than where the sale occurred, and who had no personal grievance whatever (3 R., 288–289);

Wagner Shingle Co. (5 R., 3–4), for selling a carload of shingles to the John R. Corbin Co., of Brooklyn, N. Y., who built rows of houses—100 houses a year—had a large yard, a planing mill, and never bought from the Brooklyn retail dealers (3 R., 630; 5 R., 4).

It is true that the associations were careful not to embody in their constitutions and by-laws any express agreement to refuse to buy. (See 4 R., 320–322; 4 R., 100.) That calculated omission deceives no one. When men have formed an association for the express purpose of preventing others from competing with themselves and have deliberately taken the first step toward that object by circulating black lists, it must necessarily be inferred that they also intended to take the second step—the boycott—without which the first alone would be useless. Men would not form elaborate associations to spy out information unless they intended to use that information once acquired. In short, every man who joined one of these associations did so because he desired to punish wholesalers who competed with him and because he knew that to make such punishment effective he must have the support of other retailers elsewhere.

When the machinery of a boycott has been established and set in operation, the conspirators can not escape the consequences of their acts by the simple expedient of assuring the public that they really did not intend a boycott after all; that each member is merely exercising his personal right to refuse to buy and doing so independently of all the others. That, indeed, would be exalting form above substance. It would leave the door wide open for men to accomplish the result sought in practically all the boycotts that ever were enjoined, and yet remain beyond the reach of the law.

4. Admissions of Members of Defendant Associations and Other Testimony Showing General Recognition of and Obedience to a Tacit or Moral Obligation Upon Members so to Withdraw their Patronage.

The combination did not spring from the need of mutual assistance in ascertaining the offending wholesalers. Each retailer knew well enough what wholesalers were selling to consumers in his own neighborhood. In fact the information on the black lists was furnished in most instances by the retailer immediately affected by the sale complained of. (Reilly, 8 R., 17; Steeves, 9 R., 94; Johnston, 2 R., 570.)

The real need was cooperation in refusing to buy, and membership in the associations carried with it a well-understood moral obligation to lend such mutual support. One of the appellants' briefs seems to us to concede as much when, in describing the development of the associations, it says:

> This resistance first takes the shape of individual protests and of individual resolves not

> to purchase from the offending wholesaler, but soon develops into *informal pledges of mutual support and resistance.* (Br. No. 511, p. 35. Italics ours.)

The reason for this is obvious enough. One wholesaler might sell only to retailers in Massachusetts and only to large consumers in Connecticut. (Bailey, 8 R., 241; Mansfield, 9 R., 257.) Another wholesaler might do the same thing, reversing localities. Before the associations were formed nothing could be done about it. After they were formed both of these wholesalers would be blacklisted, and neither could sell unmolested to retailers anywhere. (Lawrence, 3 R., 288, 289.)

The associations say that this was because a wholesaler who sold to large consumers in one locality might do the same elsewhere, i. e., he was not "ethical;" he had a moral blemish, and was so generally untrustworthy that no retailer ought to deal with him. (9 R., 257; 8 R., 241–242; Br. No. 550, p. 49.) But we submit that that is not the true reason. A man would be listed no matter how scrupulously he protected the retailers to whom he himself sold. (8 R., 286.) In fact, the record shows that the wholesalers who testified in this case did so protect their retailers. (Anderson, 2 R., 180; Strock, 2 R., 248; Elias, 2 R., 444; Palmer, 2 R., 478; Fisher, 2 R., 486, 494.) They were blacklisted either for selling to consumers in localities where they sold to no retailers at all, or men selling to large consumers who never bought of retailer retailer anywhere, or at least never did so at

retail prices. (Fisher, 2 R., 486, 490, 491; Lawrence, 3 R., 270, 286.) In such selling there is nothing that could be condemned under any code of ethics.

The real object of blacklisting such men was to secure cooperation in boycotting them. The individual retailer acting alone could not effectually punish a wholesaler from whom he never bought. But he could do so by securing the cooperation of the wholesaler's retail customers located elsewhere. And that is the real meaning of the "association idea," the "campaign of education" (4 R., 243), and the "loyalty to the association" of which so much is said throughout this record—namely, that retailers in Massachusetts (for instance) would refuse to deal with a wholesaler who sold to consumers in some other State, relying upon the tacit obligation of association members in that other State to reciprocate by refusing to deal with any wholesaler who sold to consumers in Massachusetts.

This tacit or "moral obligation" (8 R., 286) was repeatedly urged upon the members of the associations and was widely recognized and obeyed, as is shown by the following excerpts from the record:

The Lists themselves suggest it in their opening sentence, saying to each recipient:

> You are reminded that it is because you are members of our association and have an interest in common with your fellow members in the information contained in this statement that they communicate it to you. (1 R., 1.)

The *"Platform" of the Rhode Island Association* admits it frankly, saying:

> I will give my preference in trade to the wholesaler who solicits legitimate trade, and not to the one who solicits my customers. (4 R., 381.)

Resolution of New Jersey Association:

> We recognize as wholesale lumber dealers, and as such entitled to the patronage of the retail lumber dealers, those persons who sell to other wholesale or retail lumber dealers only. (4 R., 168.)

Reports of Board of Directors, New Jersey Association:

For 1902:

> There is one *subject of general regret* to the members of your board, and while we dislike to even give credence to the report, still we feel it our duty to revert at this time to the subject.
>
> *We refer to the rumors that some members are disloyal. A salesman for a firm reported on our list has insisted that certain members of this association have been standing by him and have given him their orders.*
>
> * * * * *
>
> We are members of an association which we support because we believe it is working to conserve our business interests. We know that it has saved thousands of dollars' worth of trade to us yearly, and we know that it has been able to do this *through the honorable action*

of its members in refusing absolutely to deal with those who sell to our customers.

Now if this association is to enjoy the fruits of the hard work, the patience, and perseverance that has been exerted in its behalf such *an action by any members can not be countenanced.*

If there is any man holding membership among us who will dishonor himself in this way his resignation should be asked for.

Nothing halfway will do. If we buy of a man who will sell to our customers then we might as well give up our work.

During the coming year your board will institute a special inquiry to ascertain facts concerning this question, and it is needless to say that *if any member is found to be disloyal summary action will be taken.* (4 R., 222–223. Italics ours.)

For 1907:

Above all things, no member of this association is justified in directly or indirectly having business relations with any wholesale dealer or manufacturer who sells to consumers, and if there is any member of this association thoughtless enough to place orders with any of the parties named in our official report we sincerely hope that they will see the great injustice which they are doing to their fellow members and to the trade in general. (4 R., 314. Italics ours.)

See also reports 1905 and 1906 (4 R., 222, 247).

Testimony of Crary, secretary New York Association, and compiler of the blacklist:

Q. Now, what was the primary object of placing these names on the list and circulating

them in the way you have stated?—A. To furnish information to our members.

* * * * *

Q. Now, what was the secondary or ultimate object of that information; what were the members supposed to desire to have, and what were they to do with it?—A. Why, we hoped that members would give their preference in the trade to those dealers who made a specialty of selling yards only.

Q. These men who were reported did not make a specialty of selling yards, because they were selling consumers?—A. Yes, sir.

Q. So that it involved in your answer I suppose the proposition that it was hoped the members receiving this list would not patronize those whose names were on the list.—A. That is right. (8 R., 504, 505.)

Testimony of Perry, Secretary of National Wholesale Lumber Dealers' Association:

Q. Did that feeling go so far that it would—as far as you know during this period—that it would influence the retailer to avoid patronizing a wholesaler whom he knew to be in the habit of soliciting consumers' trade?—A. Yes; that was the attitude of the retailer.

Q. And that was generally understood in the trade, wasn't it?—A. Yes, sir. (3 R., 452.)

A letter from Cowen, secretary Westchester County Association, ends with the following thinly veiled threat:

* * * *As an association* and individual members we would suggest that in future you

do not quote to Messrs. Crane & Company. * * *. (2 R., 564. Italics ours.)

Testimony of Reilly, secretary of New Jersey Association:

Q. Have you any general knowledge as to what extent the New Jersey retailers acted upon that information in the way you speak of, by refusing to purchase from wholesalers who were listed?—A. No, sir; I can't say exactly, but it has always been my impression that the individual retail dealer felt that it was the only means that he had to conserve to himself his own business, and I suppose that the majority of them, all of them in fact, would exercise or take such a stand. (8 R., 76.)

Testimony of Bailey, New Jersey retailer:

Q. Of course, you have stated the feeling amongst the members, and an act of that kind [purchasing from blacklisted wholesalers] would probably be on your part, if it was known by your fellow yardmen—they might criticise you personally for it?—A. They might criticise it personally; they might feel that we were *not living up to the principles of the association;* but then, there would be nothing further than that. (8 R., 243. Italics ours.)

Letter from Crowell, a retailer, to a blacklisted firm:

I received your quotations a few days ago on various items of white pine, and I am afraid I have been disloyal to the "New Jersey Lumbermen's Protective Association" in even asking prices from you, as I discover the name of your firm on the last report of our association.

I am very much surprised to find your company listed, and am writing you to ask if there is not some mistake, as I certainly want to be loyal to my home organization, and hesitate to think that you would willingly seek to embarrass or do other than please the lumbermen of New Jersey. (6 R., 256.)

Testimony of Strock, a blacklisted wholesaler, who was boycotted in Philadelphia (2 R., 258), Rhode Island (2 R., 254), and Massachusetts (2 R., 250–251):

Q. Mr. Strock, do you know of any particular effect on your business with respect to sales the posting of your name on these lists has had, or any fact in connection with any effect?—A. It has kept a certain class of the large retail yards from buying of us, which trade we would have been very glad to have had.

Q. Did you ever have it before?—A. Some of it.

Q. Do you know of any particular instance that will illustrate a refusal to buy from you on that account alone?—A. Yes. Mr. Davis, of Cross, Austin & Ireland, told me in an interview with him a few years ago, four or five years ago—that is, we were on the list; he wouldn't even consider a proposition from us; that he wouldn't buy at any price, under any circumstances, no matter what our lumber or how good or how low or what price we would offer it at. Bond Brothers & Company, of Rhode Island, the same way; they would not consider prices from us and wouldn't

give us their schedules merely because we sold people that they considered illegitimate trade.

Q. Did Mr. Davis say anything about that being in accord with his own personal view, or with the association's principles?—A. *The association principles of which he is a bound exemplar.*

Q. Did he say anything about the attitude of the retail trade generally on the proposition?—A. Yes; he said that was the attitude. (2 R., 249–250. Italics ours.)

Testimony of Pease, salesman for a New York wholesale firm which was boycotted in Massachusetts (3 R., 298) for a sale in New Jersey (3 R., 305):

Q. The record is that you went on the blacklist in January, 1904, and remained on until May, 1904?—A. No, no; good Lord, man, we might as well have shut up the place and had an auction if that had been the case. Why, no; we were on the list as I understand it—I think we were on the list 11 days; I think so.

Q. What effect did that 11 days have, then, in your particular territory?

* * * *

A. Although it was not our fault, and consideration ought to be taken for that, yet, nevertheless, I found a lot of fellows that would have done anything most for me before that occurrence, but after this thing happened, "Hello, Pease, how are you? Sit down," that is all I got; I didn't get an order. (3 R., 300.)

Testimony of Cookman, a wholesaler, boycotted and forced to abandon attempting to sell to retailers in Connecticut (3 R., 323):

> * * * along about 1904 or 1905, our salesman traveling in Connecticut came home and said it wasn't any use to go in Connecticut any more, as we were on the blacklist, and I asked him why there was any change from previous years and he says that we had been selling to some machine shop he had there. I don't remember any of the names, at the time, but we made it a custom and practice of selling to box factories and manufacturing concerns box lumber in carload quantities. (3 R., 323.)

Testimony of Lawrence, a blacklisted wholesaler:

> Q. 2. Where were these dealers located, Mr. Lawrence, who gave that as a reason for not buying of you?—A. In Massachusetts and Connecticut. (3 R., 265.)
>
> * * * many of our customers who are retailers had been prejudiced against us by that list and stopped buying of us, and stopped doing business with us through their sending out this list who had no grievance before with us or our methods. (3 R., 286.)

Testimony of Elias, a wholesaler, who was boycotted in Philadelphia (2 R., 441, 446, 447), and New Jersey (2 R., 437, 446):

> Q. Yes, your sources of supply, and the trouble you had, if any; just tell the whole story in narrative form if you can.—A. In the first place they tried to prevent us selling material, not only by blacklisting us with these

retail lumber dealers so that we could not sell any lumber to the members of the associations, but they would *follow up our shipments and then endeavor to use influence and pressure to bear on the purchaser to prevent him from buying any more*, and then they would follow up a shipment and try to find out, if they could, where it came from, and then they would in an indirect way take the matter up with the manufacturer and put us in as bad a light as they could and endeavor to prevent a manufacturer from selling us any more lumber, and in that way they tried to follow up both ends of it. (2 R., 445. Italics ours.)

Testimony of Hazard, a wholesaler, boycotted in Philadelphia:

Q. The publication of your name on that list affected your business, did it?—A. After our name was on the list, our trade with yards was practically off, and we had to confine ourselves to selling large wholesalers and retail yards, which was satisfactory, and we didn't pay much attention to our name being on the list, but I had gone in the yard—I had a great many friends in Philadelphia—and to test them, I had offered them a couple of dollars under the price I was selling wholesalers, and one man I tantalized with so many bargains, that he finally told me he wouldn't buy from me unless my name was off the list.

Q. Where was that?—A. Philadelphia. (2 R., 350.)

Testimony of Threlkeld, a wholesaler, boycotted in New York and put out of business (2 R., 217), in

reply, on cross-examination, to the question, Will you state what your grievance is against the New York Lumber Trade Association or any of the other associations?—

A. I have a grievance against the New York Lumber Trade Association as follows: On April 21, 1909, they put my firm, the Indiana Quartered Oak Company, on their unfair list, otherwise generally known as the black list, and their reason for so doing because on the 31st of December, 1908, the Indiana Quartered Oak Company sold to the Carlisle Realty Company, a building and construction corporation in New York City, 200,000 feet of plain, white-oak flooring, said Carlisle Realty Company being a consumer in the estimation of the New York Lumber Trade Association and as such being a proper customer for the retail dealers of New York City only. I complain against the New York Lumber Trade Association for putting me on the unfair list, because I claim that the Carlisle Realty Company was a proper customer for the Indiana Quartered Oak Company as a wholesale dealer in hardwood lumber, because the Carlisle Realty Company was good for its debts and bought in carloads only, which constitutes a proper trade for a wholesale hardwood lumber dealer. I complain against the New York Lumber Trade Association for sending my name out as an unfair dealer printed with about fifty-five or sixty other names on the list, which list they have sent out monthly from time to time; they have put me on that list up to the present time to every dealer, retail

lumber dealer in New York State, according to the information I have in New York State, New Jersey, Pennsylvania, and the New England States. I complain against the New York Lumber Trade Association for sending out letters in the name of the New York Lumber Trade Association signed by the secretary, J. D. Crary, to the lumber mills that are furnishing me with flooring, claiming to those lumber mills the Indiana Quartered Oak Company is an illegitimate lumber concern, and that if said manufacturers of oak flooring continue to sell to the Indiana Quartered Oak Company, then they must never expect to do any business with the members of the New York Lumber Trade Association. [See 5 R., 369-372.] I say that such acts on the part of the New York Lumber Trade Association are unfair acts to me and to others who are treated in like manner; I say that it is unfair to try to put a man out of business for trying to earn an honest living in an honorable way; that is what I claim. Therefore, I pray to God that the United States Government will bring the New York Lumber Trade Association to its senses and compel them to do business in a straightforward manner—there is my complaint. (2 R., 218.)

Other testimony showing general recognition of the moral obligation on the part of the members of the defendant associations to refuse to deal with blacklisted wholesalers may be found as follows:

Sheldon, 2 R., 137–138; Hazard, 2 R., 350; M. M. Smith, 2 R., 400–401; Johnston, 2 R., 558, 559–562,

568–569, 582; Howe, 3 R., 188; Threlkeld, 3 R., 585, 595, 599; letter by retailer urging exoneration of wholesaler, 4 R., 466; Conkling Lumber Co., 5 R., 101; American Lumber & Mfg. Co., 5 R., 581; Dillistin Lumber Company, 5 R., 3–4; Bailey, 8 R., 235; Mansfield, 9 R., 256; Todd, 9 R., 217; Judd, 9 R., 233; Chestnut, 10 R., 272, Lloyd, 10 R., 279.

5. The Inference of an Agreement to Boycott is Confirmed by the Decisions in other Conspiracy Cases.

State v. *Adams Lumber Co.* (81 Neb., 392) is directly in point. The Nebraska Lumber Dealers' Association had a constitution in all essential respects similar to that of the Philadelphia Association in this case. (81 Neb., 396–399; 4 R., 362–368.) It even had that paragraph disavowing any intent to stifle competition or to refrain from buying from wholesalers, which is so much relied upon by the brief for the Philadelphia Association. (Br., No. 511, p. 58.) Indeed, the only important difference between the two constitutions made the Nebraska case a weaker one than this, for that association, after adopting the constitution above referred to, amended it by striking out the provision making it the duty of the secretary to notify the members of the names of offending wholesalers. (81 Neb., 400.) The members were still to notify the secretary, however, though the constitution was silent as to what he should do with the information. The court refused to be deceived, saying:

> * * * While this is as far as the articles of association go, the notice would be useless

if it remained buried in the archives of the secretary, and we think that under the articles as a whole it is intended that one of the duties of the secretary shall continue to be, as it had been before, to call the "unethical" sale to the attention of the offending wholesaler, and to endeavor to prevent and put a stop to such sales in the future. The evidence shows other details of organization tending to the same end, the prevention of competition between the wholesaler or jobber and the retail dealer in the sale of lumber, and the restraining of the power and ability of the individual purchaser to buy from any but the local dealer. (p. 411.)

* * * Neither the members nor the officers of the association have taken any action, so far as the evidence shows, to prevent any member from buying from any wholesaler, whether he sold to contractors and consumers or confined his sales strictly to the retail dealers, except to create and foster a spirit in the trade against such action. Nor do the articles of association directly forbid any such purchase. * * * (p. 414.)

* * * Should any wholesaler refuse to be bound by the "ethics of the trade" as promulgated by the association, he would find that the rules and plans of the association would soon curtail, if not destroy, his business with the members of the association without reference to their locality, whether near to or distant from the place where the "poacher" has accommodated an owner with the material

> necessary for the construction of his building. * * * (p. 415.)

When the common object (prevention of sales to consumers by wholesalers) and the concerted action toward it (principally the circulation of black lists) have been proved, we may *infer* that the common design extended to all the steps taken in pursuance of the common object, including refusals to buy from offending wholesalers. As was said by Justice Coleridge in charging the jury in *Regina* v. *Murphy* (8 C. & P., 397, 404):

> You have been properly told that this being a charge of conspiracy, if you are of opinion that the acts, though done, were done without common concert and design between these two parties, the present charge can not be supported. On the other hand, I am bound to tell you, that although the common design is the root of the charge, *it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved.* If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they

have been engaged in a conspiracy to effect that object. * * * (p. 404. Italics ours.)

This is the leading case upon the character of evidence necessary to prove a conspiracy and its language is approved in *3 Greenleaf on Evidence*, § 93, and *2 Wharton Criminal Law*, § 1398.

Mr. Wharton also quotes with approval the following from *Com.* v. *McClean* (2 Pars. (Pa.), 367, 368), which bears particularly upon the attempt in this case to cloak the boycott in the guise of individual action:

> "In prosecutions for criminal conspiracies," says Judge King, "the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men so circumstanced to envelop themselves, and to trace their movements from the slight, but often unerring, marks of progress which the most adroit cunning can not so effectively obliterate as to render them unappreciable to the eye of the sagacious investigator. It is from the circumstances attending a criminal, or a series of

> criminal acts, that we are able to become satisfied that they have been the results not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole; that they have sprung from a common object, and have in view a common end." (2 *Wharton, Crim. L.*, p. 246.)

The same thought is thus stated in *Patnode* v. *Westenhaver* (114 Wis., 460), in overruling an objection as to the sufficiency of the evidence to establish a conspiracy:

> * * * The act of combining together, by two or more persons, essential to an actionable conspiracy, is not usually, if at all, established by direct evidence. If that were necessary in order to punish such wrongdoing, judicial remedies to that end would be exceedingly inefficient. There is a high degree of moral turpitude involved in the deliberation and calculation by guilty parties as to purposes and means, characterizing unlawful combinations to injure, which instinctively inspires secrecy. Therefore, existence of the element of combination is, peculiarly, a matter for proof by circumstantial evidence. * * * (p. 467.)
>
> * * * Now, if we were called upon, in order to sustain the ruling of the trial court in

submitting the cause to the jury on the subject under discussion, to decide that any express agreement between appellants to defraud respondent is indicated with sufficient clearness to any more than arouse a strong suspicion in that regard, something short of evidencing the existence of a corrupt agreement, as within reasonable probabilities, it is not clear but that we would fail. An agreement, expressly entered into, was not necessary. A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. Individual intent by two or more persons to do an unlawful act or a lawful act by unlawful means is the first step in that regard. Next follows concurrence between such individuals, not concurrence of action, merely (*U. S.* v. *Barrett*, C. C. 65 Fed., 62), but concurrence in mental intent to effect the common purpose, each to aid the others in that regard. Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators or a meeting of the members of the combine, or their, even, all knowing each other; or the precise thing to be accomplished or plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine to any other member. If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied. * * * (p. 473–474.)

So too in *United States* v. *Sacia* (2 Fed., 754, D. C. N. J.), the Court said:

> The agreement or combination is the offense, but the performance of the alleged act to effectuate it is necesssry to make it indictable in this court; and such an offense is rarely provable by direct testimony. All the text-books agree that the evidence in proof of the conspiracy may be, and from the nature of the case generally must be, circumstantial. All concerted action to violate the law or to commit a fraud is secret, and is ordinarily shown by separate independent acts, tending to exhibit a common design. *The common design is the essence of the charge, and to prove it it is not necessary to prove that the parties came together and actually agreed in terms to have that design, and to pursue it by common means.* (P. 757. Italics ours.)

Similarly, in the opinion of Judge Severens in *Reilley* v. *United States* (106 Fed., 896, C. C. A. 6th), in which Mr. Justice Day and Mr. Justice Lurton (while circuit judges) concurred, it is said:

> It is also urged that the evidence did not justify the verdict, in that there was no proof of conspiracy to do what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; * * * (p. 905).

II.

AN AGREEMENT OR COMBINATION BY RETAILERS TO REFUSE TO BUY FROM (BOYCOTT) WHOLESALERS WHO SELL DIRECTLY TO CONSUMERS INTERFERES WITH THE FREE AND NORMAL FLOW OF TRADE AND THEREFORE VIOLATES THE ANTITRUST ACT.

This is not the case of a boycotting combination which affects directly *only* the trade relations between the members of the combination and the person boycotted; such, for example, as a combination by the employees of a merchant to refuse to buy any goods from him unless he advances their wages, or a combination by laborers to strike unless their employer advances their wages, or a combination by the customers of a dealer to refuse longer to buy from him unless he lowers his prices, or a combination by traders to refuse to sell to any person indebted to one of their number. It is therefore not necessary to discuss the legal footing of such a boycott.

On the other hand, a combination by retailers to boycott wholesalers who sell to consumers affects directly not only the trade relations between the members of the combination and the boycotted wholesalers, but also the trade relations between the wholesalers and strangers to the combination, namely, consumers, since the direct tendency of such a boycott is to prevent wholesalers from selling to consumers.

By thus frightening away wholesalers with whom some consumers might reasonably have anticipated profitable exchanges, it narrows the field in which

consumers can buy at the same time that it narrows the field in which wholesalers can sell.

That such a boycott restrains trade necessarily follows, we think, from *Loewe* v. *Lawlor* (208 U. S., 274), where this court held that a combination of workingmen to boycott the hats of a manufacturer and thereby deter dealers from purchasing them in order to compel the manufacturer to unionize his shop is a combination in restraint of trade. The decision was expressly based on the principle that a combination to boycott a trader which directly interferes with his trade with strangers essentially obstructs the free flow of commerce (p. 293). Such a combination, said the court,

> falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes; * * * (p. 294).

In *Gompers* v. *Buck Stove and Range Co.* (221 U. S., 418), also a case of boycotting, although not one arising under the antitrust act, *Loewe* v. *Lawlor, supra*, was approved, the court saying (p. 438):

> But the principle announced by the court was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraints be occasioned by unlawful contracts, trusts, pooling arrangements, *blacklists*, *boycotts*, coercion, threats, intimidation, and whether these be made effec-

> tive, in whole or in part, by acts, words or printed matter. (Italics ours.)

In the same case the court of appeals of the District of Columbia said (33 App., D. C., 83, 107):

> But a powerful combination to boycott immediately deflects the natural course of trade, * * *.

Other Federal cases resting on the same principle are *Montague* v. *Lowry* (193 U. S., 38) and *Ellis* v. *Inman* (131 Fed., 183; C. C. A., 9th). In the first it was held that a combination of wholesale dealers in tile in San Francisco and of manufacturers of tile in other States by which dealers agreed not to purchase from nonmember manufacturers and the manufacturers agreed not to sell to nonmember dealers restrained trade in violation of the antitrust act; in the second, that an agreement by all the lumber dealers in a certain city to refuse to sell to consumers who bought any lumber from outside dealers likewise restrained trade in violation ot the antitrust act.

The record in the present case discloses a natural flow of trade between wholesale dealers in lumber and consumers who purchase in large quantities, and the boycott by the defendants obstructs and interferes with that trade by preventing or hindering wholesalers from selling to such consumers and conversely by requiring the latter to buy only of retailers.

In *State* v. *Adams Lumber Company* (81 Neb., 393) and *Retail Lumber Dealers' Association* v. *State* (Miss. 48 So., 1021), combinations of retail lumber dealers to refuse to buy from wholesalers who sell to con-

sumers, organized on the same plan and carried into effect by the same means as the present combination, were adjudged in restraint of trade and unlawful. In each of those cases the articles of association formally recited, as do the articles of some of the associations defendant in this case, that the members—

> recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit;

and provided that—

> no coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the association, or to buy or refrain from buying of any particular manufacturer or wholesaler;

and that no discriminatory practices shall—

> be used or allowed against any retailer for the reason that he may not be a member of the association, or to induce or persuade him to become such member. (48 So., 1021, 1022; 81 Neb., 396, 397.)

In the Nebraska case, furthermore, no lists of offending wholesalers were circulated amongst the members of the retail dealers' association. The secretary of the association would merely ask the offending wholesaler for an explanation.

But in each case the court looked through to the purpose and actual effect of the combination. In the Nebraska case the court said (pp. 414, 415):

> Neither the members nor the officers of the association have taken any action, so far as the

evidence shows, to prevent any member from buying from any wholesaler, whether he sold to contractors and consumers or confined his sales strictly to the retail dealers, except to create and foster a spirit in the trade against such action. Nor do the articles of association directly forbid any such purchase. Nevertheless, we think no candid and unprejudiced individual can read the evidence in this record without becoming convinced that the complaints sent by the secretary of the association to the various offending jobbers and wholesalers produced a much more powerful effect upon their minds than if the notices had been sent or complaints made by an individual dealer, or by Critchfield himself as agent for a single dealer. The effect of the combination and association was probably as great upon the jobber or manufacturer as if the ordinary and usual methods of the more highly organized associations of this character were being used, such as sending notices to the entire retail trade that a certain jobber was selling to consumers, or such as assessing and collecting a portion of the profit for the benefit of the retailer whose trade was injured, or by fining members of the association who bought from the offending jobber. * * * In short, the purpose is to put it out of the power of the contractor or consumer to buy, unless he submits to the force of the association and makes his purchase from whom and where they may dictate, and at the price demanded by the "regular" dealer, and the object seems to have been largely accomplished throughout

> the State. The power of the association is not confined to Nebraska. It is closely allied with similar associations of many other States, and those combinations are made use of, as we have seen, for the purpose of aiding in the suppression of competition, and in restraint of trade and commerce in this State.

The constitutionality of the statute under which it was decided being in issue, the Mississippi case was brought to this court, and Mr. Justice Lurton, delivering the opinion, made the following analysis of the combination there assailed, which is conclusive of the present case, the combinations involved in the two cases being alike, as above pointed out (*Grenada Lumber Co.* v. *Miss.*, 217 U. S., 433, 441):

> For the purpose of suppressing this competition they have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with any one who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association. Thus they have stripped themselves of all freedom of contract in order to compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact. Whether it would be an illegal restraint at common law is not now

> for our determination. It is an illegal combination and conspiracy under the Mississippi statute. That is enough if the statute does not infringe the fourteenth amendment.

In *Jackson* v. *Stanfield* (137 Ind., 592) an agreement of retail lumber dealers to refuse to buy from wholesalers who sold directly to consumers was held to be in restraint of trade and illegal at common law. It is true that in that case parties to the agreement who dealt with offending wholesalers were subject to a penalty, but as will subsequently be shown that did not make the character of the combination different from what otherwise it would have been, but only made its object perhaps more certain of accomplishment. The court said (p. 614):

> This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may, and do, sometimes become honorary members so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade.

The court refused to follow *Bohn Mfg. Co.* v. *Hollis* (54 Minn., 223), relied upon by the defendants here, which upheld a combination of retail dealers to prevent wholesalers from selling directly to consumers.

In *Olive* v. *Van Patten* (7 Tex. Civ. App., 630), a suit for damages by a wholesale lumber dealer who had been boycotted by a combination of retail

dealers because he sold to consumers, the court said (p. 637):

> It can not be held that defendants had the right to prevent plaintiffs from selling to consumers, or that such interference by them (the defendants) was serving a legitimate purpose connected with their own business. To break plaintiffs down as competitors for the consumer's trade might, it is true, result in benefit to defendants, but such a benefit obtained in such manner could not be deemed a legitimate purpose within the meaning of the opinion quoted.

Amongst the cases not exactly in point but analogous the following are cited:

Bailey v. *Master Plumbers' Association* (103 Tenn., 99, 117).

Brown & Allen v. *Jacobs Pharmacy Co.* (115 Ga., 429, 444).

Klingel's Pharmacy v. *Sharp* (104 Md., 218).

Doremus v. *Hennesy* (176 Ill., 608).

Purington v. *Hinchliff* (219 Ill., 159).

Hawarden v. *Youghiogheny Coal Co.* (111 Wis., 545).

Webb v. *Drake* (26 So., 791, La.).

Boutwell v. *Marr* (71 Vt., 1).

Hopkins v. *Oxley Stave Co.* (83 Fed., 912, C. C. A., 8th).

Thomas v. *C. N. O. & T. P. R. Co.* (62 Fed., 803).

Casey v. *Cincinnati Typographical Union* (45 Fed., 135, C. Ct.).

Lucke v. *Clothing Cutters' & Trimmers Assembly* (77 Md., 396).

Beck v. *Railway Teamsters' Union* (42 L. R. A., 407, Mich.).

The only cases to the contrary of which we are aware are:

Bohn Mfg. Co. v. *Hollis* (54 Minn., 223; 55 N. W., 1119).

Macauley Bros. v. *Tierney* (19 R. I., 255).

Montgomery Ward & Co. v. *So. Dak. Retail Merchants and H. D. Ass'n* (150 Fed., 413).

These cases are directly in conflict with the principle established in *Loewe* v. *Lawlor, supra,* and with the view expressed by this court in *Grenada Lumber Co.* v. *Mississippi, supra,* that a combination of retailers to refrain from buying from wholesalers who sell directly to consumers is one in restraint of trade (p. 441), and with the decisions to the same effect in the cases cited from the State courts.

Bohn Mfg. Co. v. *Hollis,* which was decided in 1893, went largely upon the proposition that since one retail dealer had the undoubted right to refuse to buy from wholesalers who sell directly to consumers many retail dealers might combine to the same end. Indeed the court stated that this proposition was decisive of the case. (55 N. W., 1121.) This is a view of the law not generally entertained and is certainly not accepted by this court, which, in *Grenada Lumber Co.* v. *Mississippi, supra,* said (p. 440):

> That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a

> producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed. (*Callan* v. *Wilson* 127 U. S., 555, 556.)

In *Macauley Bros.* v. *Tierney, supra*, decided in 1895, the court was also manifestly influenced by the same thought, saying (p. 264):

> What a person may lawfully do a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, providing the means employed be not unlawful.

Montgomery Ward & Co. v. *South Dakota Retail Merchants and H. D. Ass'n, supra*, was a case in the Circuit Court for the District of South Dakota, and like the cases in Minnesota and Rhode Island just referred to, was decided before *Loewe* v. *Lawlor, supra*, and is in direct conflict, we submit, with the principle of that case.

In the Mississippi case above referred to the State Supreme Court concluded a review of the authorities as follows (48 So., 1022):

> We have each of us carefully read the able arguments and laboriously reviewed the mass of authorities cited by counsel in this case. It is indisputable that a line of the older authorities, commencing with the Bohn case (54 Minn., 223, 55 N. W., 1119, 21 L. R. A., 337, 40 Am. St. Rep., 319, and ending with the Montgomery Ward case (C. C.) 150 Fed. 413), hold that at common law, and under the particular statutes therein construed, it is lawful for retailers to combine and agree not to purchase from wholesalers who sell direct to consumers, so long as they confine themselves to a simple withdrawal of their own patronage, without resorting to any agreement with the wholesaler direct, or threats, or fines, or other direct coercive measures. These courts base their decisions upon the theory that such a combination is a legitimate protective and defensive measure, and that, since it is perfectly lawful for each individual retailer to withdraw his patronage from a wholesaler at any time and for any cause, it is equally lawful for them to combine to do what each might lawfully do individually. But the courts of Indiana, Georgia, Nebraska, and Tennessee, and other States, have expressly repudiated the grounds upon which the former decisions were rested, and declare the doctrine therein announced, that what one may lawfully do any number may combine to do, to be untrue and unsound,

> and these decisions cite many instances where the vice and harm lies in the combination alone.

It is immaterial that the members of the defendant associations are not subject to penalties or other coercive measures if they deal with an offending wholesaler. The purpose and effect of the agreement determine its character. The means adopted by the parties to assure each other's observance of the agreement are not important if in fact they do observe it. Thus, in *Cooke on Combinations, Monopolies, Labor Combinations* (1909), the suggestion that such coercive provisions are an essential element is rejected with the remark—

> that it involves taking into consideration the purely internal management of an association. (Sec. 34.)

In the present case the district court observed (1 R., 3):

> Retail dealers who are members of one or the other of these associations defendant are not required by their associations to refrain from dealing with any wholesalers whose names are on the list. There is no fine or penalty for dealing with them; nor is the retailer disciplined in any way if he does deal with them. *But the record indicates that no such discipline is necessary.* (Italics ours.)

In the boycotting combinations assailed in *Loewe* v. *Lawlor, Gompers* v. *Buck Stove and Range Co., State* v. *Adams Lumber Co.,* and *Retail Lumber Dealers' Association* v. *State* (reviewed here sub nom.

Grenada Lumber Co. v. *Miss.*), *supra*, there were no coercive measures to compel members to withdraw their patronage from offending dealers.

Nor, again, is it material that the combination has not succeeded in compelling all wholesalers to stop selling to consumers. The vice of a boycott is not so much that it suppresses competition but that it deprives a trader of his right to engage in business with others except upon conditions imposed by the combination. A boycott of a single trader is just as much a violation of the act of Congress as a boycott of many. (*Loewe* v. *Lawlor*, *supra*.)

Thus, in *Montague* v. *Lowry*, *supra*, it is said (193 U. S., 46):

> Again it is contended the sale of unset tiles is so small in San Francisco as to be a negligible quantity; that it does not amount to 1 per cent of the business of the dealers in tiles in that city. The amount of trade in the commodity is not very material.

To the same effect is the case of *Steers* v. *United States* (192 Fed., 1, 5, C. C. A. 6th Cir.), where it is said:

> We do not find in the Standard Oil and Tobacco cases any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if

> such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.
>
> * * * * *
>
> We can not doubt that there may be a conspiracy under the act with reference to a single shipment only, and that, in so far as the rule of insignificance may exist, it does not apply to circumstances like these.

Similarly in *Brown* v. *Jacobs Pharmacy Co.* (115 Ga., 429) it was said (p. 434):

> Thus it is suggested, inasmuch as the evidence shows that not all of the druggists of Atlanta are members of the local association, but only about three-fourths of them, that the combination or agreement was not obnoxious to this rule, or the rule declaring agreements or contracts tending to monoply, against public policy, even if it would have been so were all members. We do not think this distinction sound. Nothing is more common than for the courts to declare contracts between only two persons, who by no means control a particular kind of business, void as contrary to public policy. It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition, or not.

Turning from the law to the facts, the interference with trade resulting from this boycott has been anything but negligible. The record contains evidence of interference with the trade between hundreds of wholesale dealers on the one hand and consumers on the other, over 200 of the former having been actually blacklisted, whilst many others were frightened into submission. (Report of Secretary New Jersey Association, 4 R., 205; Ennis, 8 R., 345; Mansfield, 9 R., 254. See correspondence in 4 R.; also Van Kirk, 2 R., 315, 316. Fisher, 2 R., 486, 494; 5 R., 538.) And the secretary of the New Jersey Association reports to the members that—

> This association is stopping the shipment of thousands of irregular cars every year by its organization, but it can not completely stop them, because it can not prevent new scalpers from having a try at such methods; it can only meet the trouble where it is found and work with it until something happens. (4 R., 248.)

III.

VIEWING THE AGREEMENT OR COMBINATION BETWEEN THE DEFENDANTS MERELY AS ONE TO CIRCULATE AMONGST THEMSELVES LISTS OF WHOLESALERS WHO SELL DIRECTLY TO CONSUMERS, IT UNREASONABLY RESTRICTS COMPETITION BETWEEN WHOLESALERS AND RETAILERS IN SELLING TO CONSUMERS AND THEREFORE VIOLATES THE ANTI-TRUST ACT.

This is the ground on which the district court based its decision. It said (1 R., 3, 4):

> To a greater or less extent therefore the circulation of these "official reports" oper-

> ates to prevent some wholesalers, who otherwise would enter into competition with retailers in supplying consumers, from undertaking so to compete. That the reports are prepared and circulated to accomplish that very object is manifest. * * *
>
> The circulation of this circular certainly tends to restrain, directly, some wholesalers from entering into competition with retailers. This seems to be contrary to the statute, as the Supreme Court has construed it.

The facts on which this proposition rests are not in dispute. Thus the brief of appellants in No. 511 states (p. 4):

> Neither the character of this list or report nor the facts and circumstances connected with its preparation and circulation are in controversy. It was printed and issued from time to time, say about once a month, by a Mr. Crary of New York, as agent for the defendant retail associations, and on their behalf and distributed by them, to their members, and contained simply the names of such wholesale lumber dealers as had been engaged in selling lumber to consumers so called; that is to say to actual consumers of lumber, who were within the class of customers, actual or potential, of the defendant retail lumber dealers or of one or some of them.
>
> * * * * *
>
> It was and is conceded by defendants and the court below found that the circulation of this information would have a natural ten-

> dency to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them.

And the brief of appellants in No. 550 accepts the district court's findings of fact (p. 4).

In the *Tobacco case* (221 U. S., 106), this court said (p. 179):

> Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.

Again, in *Nash* v. *United States* (229 U. S., 373) it was observed (p. 376):

> Those cases (the Standard Oil and Tobacco cases) may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.

Obviously, as the district court found, the circulation amongst the defendant associations of lists containing the names of wholesalers who sell directly to consumers, with the purpose and effect of causing members not to buy from the listed wholesalers, directly tended to coerce wholesalers into refraining from selling to consumers, and thus restricted competition between retailers and wholesalers in selling to consumers.

Was this restriction of competition undue or unreasonable? Whether a restriction of competition is undue or unreasonable is determined by the intent of the parties or the inherent nature or effect of the acts which brought about the restriction. (*Standard Oil case*, 221 U. S., 1, 58; *Tobacco case*, *supra*, p. 179; *United States* v. *Reading Co.*, 226 U. S., p. 370; *Nash* v. *United States*, *supra*, p. 376.)

Restriction of competition is undue or unreasonable where either the inherent nature or effect of the contracts or other acts which brought it about or the surrounding circumstances—

> justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. (*Standard Oil case, supra*, p. 58.)

On the other hand, if the restriction be only an incident of entering into a normal business relation, for instance, a partnership, and the parties did not enter into the relation for the purpose of restricting competition, the restriction would not be held undue or unreasonable.

Here, the deliberate purpose of the associated retailers was to prevent wholesalers from competing with them not only in selling to the class of consumers who can most conveniently be supplied by the retailers, but also in selling to consumers who buy in wholesale quantities, i. e., carload and shipload lots. That the purpose of circulating the lists is to protect the retailers from the competition of wholesalers is in fact expressly admitted in the brief of appellants in No. 550:

> The essence of the reason for these lists is protection against *secret* competition. (p. 38.)

Calling it *secret* competition does not break the force of the admission. Wholesalers as a rule did not attempt to conceal their sales to consumers. They could not have done so had they desired. The witness Steeves called by the defense makes this clear (9 R., 117, 118):

> Q. So that if you lost a customer through a wholesaler to-day it would not be very long before you knew all about it, would it?—A. Not very.
>
> Q. Will you tell us just what assistance this list is to you personally in that one respect; does it assist you to find out who sells to big building contractors that you have been sup-

plying for several years?—A. It assists me to find out any man that has as a part of his business the selling of lumber to my customers.

Q. Now, wait a moment; that is not what I asked you. Does it assist you to find out who sells to that particular customer of yours with whom you have been dealing for several years; you know that anyway, without the list, don't you?—A. No, I don't care anything about it.

Again, the arrangement by which defendants have thus restricted competition—by circulating amongst themselves by agreement lists of wholesalers who sell directly to consumers—is not a normal or natural method of industrial or trade development, but on the contrary is an attempt to obstruct and impede the natural flow of trade—to divert it from the course it would take if free.

It may well be that the function of the retailer in the lumber trade is a natural one, and highly useful, indeed indispensable to small consumers. It is submitted, however, that in so far as the function of the retailer is natural and normal it will assert itself, and that in so far as combinations and other such means are necessary to sustain it, it is not natural and normal.

The fact is, as has been shown, that certain classes of consumers of lumber have found it practicable and greatly in their interest to purchase their requirements directly from the millman or the wholesaler, and thereby avoid paying the retailer's profit, and that a natural current of trade has developed along

these lines, and that the purpose of the defendant associations is to divert trade out of this natural channel rather than to keep it in natural channels.

Wholesalers have refrained from selling to consumers not because they wished to refrain but because they feared concerted reprisal, which might mean ruin. The evidence in this case bears out only too well the observation of Lord Lindley in *Quinn* v. *Leatham* (1901) A. C., 495, 538, that—

> Blacklists are real instruments of coercion, as every man whose name is on one soon discovers at his cost.

Wholesalers were forced to refrain from competing not merely with retail dealers to whom they sold but also with dealers to whom they did not sell; i. e., they could not sell to consumers *anywhere*, even in places where they never sold to retailers. And, furthermore, they were kept from seeking the trade not merely of consumers of the kind who are natural customers of retail yards (which trade in fact they seldom sought), but also and principally of consumers who bought by shiploads and carloads, and had never bought from anyone but wholesalers, or at any rate had never bought from anyone at retail prices. (Perry, 3 R., 470; Threlkeld, 2 R., 213; Sheldon, 2 R., 133–134; Milne, 2 R., 159; Salmon, 2 R., 185; Swayze, 2 R., 232; Elias, 2 R., 460, 469; Wheeler, 2 R., 542; Johnston, 2 R., 573.) It is thus apparent that it was not the wholesalers who were the aggressors, encroaching upon the retailers' trade. On the contrary, the aggressors were the retailers who used

the power of the blacklist to drive from competition with themselves the dealers to whom the trade normally belonged.

Plainly, therefore, the agreement for the circulation of these blacklists is—

> wholly inconsistent with the theory that [it was] made with the single conception of advancing the development of business power by usual methods, but * * * on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. (*Standard Oil case, supra*, p. 76.)

Another effect of the arrangement if permitted to stand would be that consumers of lumber in any quantity whatever, even those purchasing in several carloads at a time, could be compelled to pay retail instead of wholesale prices. Of course, the wholesaler, shipping directly from the millman, without the expense of maintaining yards, delivery equipment, etc., is able to supply large consumers upon much more advantageous terms than is the retailer, who must pay all of these expenses and a wholesaler's profit as well. The retail yard dealer must charge consumers from 20 per cent to 25 per cent more than he himself originally paid for the lumber. (Davis, 9 R., 34; Yerkes, 9 R., 165, 191, 192; Judd, 9 R., 227, 228; Mansfield, 9 R., 241; Bailey, 8 R., 223.) On the other hand, lumber can be sold and shipped by wholesale from the mills directly to con-

sumers at an advance of but 3 per cent to 5 per cent above the cost to the wholesaler. (Smock, 8 R., 273; Davis, 9 R., 18, 20; Yerkes, 9 R., 165; Judd, 9 R., 227; Mansfield, 9 R., 241.) On wholesale deliveries of hardwood there is a saving to the consumer of from $4 to $5 a thousand feet as compared with retail prices. (Fisher, 2 R., 493, 494; Threlkeld, 3 R., 589; Steeves, 9 R., 116.) On miscellaneous lumber there would also be a saving of several dollars a thousand feet. (Byrne, 2 R., 289; Morris, 3 R., 619; Haggart, 3 R., 625; Gooding, 3 R., 632; Smock, 8 R., 273.)

The elimination of unnecessary middlemen is one way of reducing prices. It repeatedly appears in the record that large consumers of lumber can conveniently and profitably deal directly with wholesalers without the intervention of retailers and that if they were under no restraints they would do so. A combination whose admitted object is to thwart this natural and beneficial course of trade certainly can not be justified as one of—

> those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free. (*Tobacco Case, supra*, p. 181.)

It follows that this agreement to blacklist, whether judged by its inherent nature or effect or by the intent of the parties, prejudices the public interests by unduly restricting competition.

IV.

THE PLEA THAT THIS COMBINATION WAS A REASONABLE AND NECESSARY MEASURE TO DEFEND THE POSITION OF RETAILERS IN THE TRADE IS IRRELEVANT IN LAW AND UNFOUNDED IN FACT.

The argument made in support of the two preceding propositions carried with it the answer to this plea, since a combination which restrains trade by boycotting a dealer in such manner as directly to interfere with his business dealings with strangers or by unduly restricting competition is not to be justified as a defensive measure.

In *Grenada Lumber Company* v. *Mississippi, supra,* the same plea was made, and was rejected by this court (217 U. S., 441):

> But the plaintiffs in error say that the action which they have taken is purely defensive, and that they can not maintain themselves as independent dealers supplying the consumer if the producers or wholesalers from whom they buy may not be prevented from competing with them for the direct trade of the consumer.
>
> * * * * *
>
> That such an agreement is one in restraint of trade is undeniable, *whatever the motive or necessity* which has induced the compact. (Italics ours.)

In *Loewe* v. *Lawlor* (187 Fed., 522), subsequent to the decision by the Supreme Court (208 U. S., 274),

the Circuit Court of Appeals (2d circuit) said (p. 524):

> * * * recovery may be had, although the impelling motive of the combination was an effort to better the condition of the combiners, which except for the antitrust act might be proper and lawful.

In *Chesapeake & Ohio Fuel Company* v. *United States* (115 Fed., 610, C. C. A., 6th) Mr. Justice Day (then a circuit judge) said (p. 622):

> And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field, and improve the character of the product, these objects are beneficial to the public as well as to the private parties, lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. The argument here advanced would be available to nearly every combination of this kind. Wider markets and more trade may be the inducements to such agreements but they are purposes which the act of Congress does not permit to interfere with the freedom of interstate traffic.

But if this plea were relevant in law, it could still be answered that it is unfounded in fact—that the combination assailed is not a reasonable and necessary defensive measure.

As before stated, the retailers, not the wholesalers, were the aggressors.

Their purpose was to prevent wholesalers from competing with them for the patronage not alone of small consumers, whose trade the wholesalers seldom sought, but of consumers who bought by shiploads and carloads and only at wholesale prices (Perry, 3 R., 470; Threlkeld, 2 R., 213; Sheldon, 2 R., 133–134; Milne, 2 R., 159; Salmon, 2 R., 185; Swayze, 2 R., 232; Elias, 2 R., 460, 469; Wheeler, 2 R., 542; Johnston, 2 R., 573), and who never had been and under normal conditions never would be customers of the retail yard dealers. To illustrate, amongst the consumers to whom sales by wholesalers were deemed objectionable by the combined retailers were the following:

The Standard Oil Company (2 R., 255; 3 R., 143, 147, 149);

The General Electric Company (2 R., 486, 498);

Stetson Hat Company (6 R., 172);

Baldwin Locomotive Works (3 R., 156, 157);

Cramp Shipbuilding Company (3 R., 156, 157);

The Foran Foundry Company (5 R., 494, 538);

John R. Corbin Company, a concern building rows of houses, 100 houses a year (3 R., 630);

The Philadelphia Rapid Transit Company (4 R., 466, 526);

The Standard Underground Cable Company (2 R., 565, 561, 562, 570; 5 R., 582, 586);

United Lead Company (2 R., 570);

The Edison Phonograph Works (2 R., 563; 5 R., 587);

R. S. & J. Sax, dock builders, using millions of feet a year (2 R., 250).

Trade such as this normally belonged to the wholesaler. We repeat, therefore, that the aggressors were the retailers, not seeking this trade as a privilege to be won by normal business methods (e. g., better service, lower prices, etc.) but claiming it as a right and using the power of their combination for the avowed object of driving wholesalers from the field. Thus, so far from being a defensive measure, the purposes of this combination were highly aggressive.

Again, this combination was not necessary in order to inform retailers when a wholesaler from whom they bought was selling to consumers in their territory. As already shown the wholesaler, assuming that he had a disposition to do so, could not very well conceal a sale by him to a consumer. The retailer in whose territory the sale should be made would very soon find it out. (Steeves 9 R., 117, 118). It is clear, therefore, that the object of the combination was not merely to shield each retailer from the competition of the wholesaler with whom he dealt: the object was rather to shield each retailer from the competition of *all* wholesalers. The retailers to whom a wholesaler sold and with whom he scrupulously avoided competing joined with the rest to punish him for selling to consumers in regions where he never sold to retailers and where therefore no possible obligation rested upon him not to sell to consumers. (Lawrence, 3 R., 288, 289.) The follow-

ing statement of this court in *Grenada Lumber Company* v. *Mississippi*, *supra*, is apposite here (217 U. S., 441):

> For the purpose of suppressing this competition [the competition of wholesalers] they [the retailers] have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with anyone who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association.

The decree of the District Court should be affirmed.

G. CARROLL TODD,
Assistant to the Attorney General.

OCTOBER, 1913.

○

INDEX.

PAGE.

The Reason for the Reply Brief 1

POINT I.—The Government never has proved a combination or conspiracy of the defendants in this case to refuse to deal with persons whose names appear upon the official lists. There is affirmative proof, on the contrary, the other way 2

(a) The findings of the Court below are against the Government in this respect 2

(b) The question is one of evidence and fact, and not of mere legal conclusions 3

(c) Detailed discussion of the citations from the record that appear in the Government's brief 6

(d) Quotations from the record affirmatively showing that there was no such combination 23

(e) Conclusions 33

POINT II.—One or two observations with reference to Points III and IV of the Government's brief 34

POINT III.—The decree below should be reversed and the bill dismissed 43

Supreme Court of the United States.

WILLIAM C. MACBRIDE, individually and as President of the RETAIL LUMBERMEN'S ASSOCIATION OF PHILADELPHIA *et al.*,
Appellants,

against

THE UNITED STATES,
Respondent.

REPLY BRIEF FOR APPELLANTS.

The conspicuous characteristic of the Government's brief in this case, is the change of base from one grounded in the facts stated in the opinion below and in the reasoning adduced therefrom. The attitude thus taken by the Department of Justice is very acceptable to appellants' counsel, in that it confesses in effect a lack of confidence in the correctness of the views of the law held by the District Court. But, at the same time, it brings to pass the contingency suggested at page 4 of our main brief, under which circumstances a brief in reply would be necessary.

We decidedly take issue with the views of the Government's counsel upon the fact of the existence of a

boycott; and we naturally must discuss the evidence upon this point at greater length than we did in our main brief, now that the Government has in substance made it the pivot of the case.

THE ARGUMENT IN REPLY.

I.

The Government never has proved a combination or conspiracy of the defendants in this case to refuse to deal with persons whose names appear upon the official lists. There is affirmative proof, on the contrary, the other way.

(*a*)

A double burden is on the Government regarding this aspect of the litigation; first, because the burden of proof is always upon a complainant, and, second, because the Circuit Judges found against the Government in this particular. The point of the Government is no new one. They insisted below, in the same way that they do now, that there was a boycott. Responsive to that argument upon the facts, the opinion below says:

> "Nothing else, so far as we understand it, is now or was being done at the time suit was brought, by defendants *as a combination*, except the circulation of these lists among the members of retail lumber dealers associations and corporations. This seems to be the extent of their offending." (Italics are ours).

At a later portion of the opinion it is likewise said:

> "Retail dealers, who are members of one or other of these associations defendant, are not required

> by their associations to refrain from dealing with any wholesalers whose names are on the list. There is no fine or penalty for dealing with them; nor is the retailer disciplined in any way if he does deal with them."

Thus the learned Circuit Judges came to the conclusion of fact that there was no proof of a combination to refuse to deal. If they had not done so, there would have been no occasion to discuss the legality of the combination to distribute the information contained in the official lists. If there had been a conspiracy by way of boycott against wholesale dealers who sold direct to the consuming trade, then the lists would have become incidental; and, moreover, under the views entertained of the Sherman Act by those Judges, the decree of the Court below would have enjoined such a conspiracy.

In short, the Government invites this Supreme Court to go through this enormous record, to find a conspiracy of boycott, and incidentally to overturn the decision of the Judges below upon the facts. Undoubtedly this Court has the power so to do, but we earnestly submit that there is nothing in the record which calls for its exercise.

(*b*)

In discussing this question of the evidence, there ought to be no misunderstanding as to the point to which the Government and ourselves are addressing the respective arguments.

We admit that a natural instinct of a retail lumber

dealer who found the name of a supposed wholesaler upon these lists, and was made aware (through this or any other way) that the supposed wholesaler was his own rival in the trade, would be to give a preference in his own purchases of lumber, other things being equal and his own interests subserved, to some wholesaler who did not as well do a retail business; also that this natural instinct is an influencing factor, causing wholesalers, in the furtherance of their own trade, to elect some of them to be both wholesalers and retailers and others of them to be simply wholesalers (as we endeavored to analyze the situation at pages 39 to 41 of our main brief). It was upon that admission, which we made below and which we make again here, that the Court below came to legal conclusions against us, and it is the correctness of those legal conclusions which we have undertaken to combat in the main point of our brief (pages 22 to 47). But the present point of dispute is different—though it assumes the correctness of a theory which to us, with all due respect, seems too plainly right to require extended argument, namely, that a course of action that merely follows a natural instinct of the individual, has nothing to do with conspiracy laws at all. It is almost too simple to observe, that the very same act, for instance Smith's refusal to buy lumber from Jones, would clearly constitute no crime if it was impelled from the mere discovery that Jones was really a rival of Smith's, while it might (we will concede for the moment) constitute an overt act in the crime of conspiracy if it proceeded from some agreement, formal or informal, not to buy from Jones, made

with other conspirators in a combination. It seems to us also equally patent, that a combination to diffuse information as to the habits of certain supposed wholesalers in the trade, cannot be turned into a proven combination to refuse to deal with such wholesalers, by a mere operation of law, and without *evidence* that there is such latter combination—just through that long suffering legal axiom that everyone intends the consequences of his own acts. A conspiracy in restraint of trade is a combination by which men agree, formally or informally, on a concert of action to interrupt the normal flow of trade. Individual and instinctive action, though following upon knowledge acquired and information received by whatever means, is no conspiracy. Of course it isn't; and incidentally that is the very kind of action that establishes what *is* the normal flow of trade in any particular business.

We do not intend to go into all of this *de novo,* as it was discussed in the opening pages of Point III of our brief, on the question of boycott (pp. 48-50), and also is incidentally treated at various portions of Point II of our brief immediately preceding it. We refer again especially to the case of *United States* vs. *Kissel,* 218 U. S., 601, in the connection that it is cited at page 49 of our brief, holding that a conspiracy can only be predicated upon an actual agreement, express or implied, and to our illustration of concerts of action, appearing on that page of our brief, caused by the instinct of individuals and not by an agreement or meeting of minds.

The question, therefore, always remains in this litigation, as to whether there was *evidence* of a combina-

tion of these defendant retailers to refuse to deal with wholesalers who sold to consumers. We submit that there was not.

(*c*)

The simplest way to deal with this question of what the testimony shows, is to follow along with our own comments in the order of the statements in the Government's brief.

Passing for the moment the question of supposed admissions in the brief of our learned associate counsel, of which as a whole we shall speak later in this point, the Government first adduces the declarations of various of the defendant associations appearing in their constitution and by-laws (p. 11 of the Government's brief):

The first treated in this connection is that of the New Jersey Association. We must respectfully decline to discuss the doings of other associations than the Philadelphia Association and the Eastern States Retail Lumber Dealers' Association, first, because they are not represented by ourselves, but by counsel who can well take care of them, and, second, because the members of the Philadelphia Association are not responsible for actions beyond the scope of its own charter and by-laws, or of the charter and by-laws of the Eastern States Retail Lumber Dealers' Association. We went into this with the utmost care in our main brief in Point V (pp. 60 to 68); and we respectfully rest upon the argument

there made, and upon the decisions in the *Reading* case, 226 U. S., 324; *State* vs. *Adams Lumber Co.*, 81 Neb., 392; *Lawlor* vs. *Loewe*, 187 Fed. Rep., 522, there cited. If there are any "minor combinations," to use the phrase that his Honor Justice Lurton used in the opinion in the *Reading* case, which appear from this record to be in restraint of trade, this bill, we submit, may be dismissed without prejudice in so far as relief may in other litigations be sought against such minor combinations. If the defendants represented by us are not parties thereto, certainly they are not guilty of any infractions of the Sherman Act in that regard, and the bill must be dismissed *in toto* as to them.

The next declaration of purpose cited by the Government's brief (p. 12 thereof) is that of the Philadelphia Association. As the quotation appears we fail to see any evidence of an association of persons banded together with the object of refusing to deal with other persons, but as the Government is in this subdivision of its point relying upon the *language* in these declarations of purposes, and not yet arguing that they are mere covers, it would have been fairer to have given the entire declaration of purposes of the Philadelphia Association. The omission in the Government's brief represented by the stars at page 12 thereof is as follows:

> " We recognize the absolute right of every person, partnership, or corporation to establish and maintain as many retail yards as he, they, or it may see fit.
>
> " We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever prices they may see fit " (Vol. IV, p. 362).

Still more unfair is the Government in its quotation at page 13 of the brief, of the declaration of principles of what is there called the Eastern States Association. We certainly were misled for the moment on reading the brief, and we think that the Court will be misled on reading the brief, into the thought that these are the declarations of principles of the defendant, the Eastern States Retail Lumber Dealers' Association. Especially is this true as there is subjoined to them under the same heading an extract from by-laws which are by-laws of the defendant the Eastern States Retail Lumber Dealers' Association. These declarations of principles are nothing of the kind. They appear at page 33 of Vol. IV of the record as part of Petitioner's Exhibit 1. The index at the beginning of this volume gives Exhibit 1 the name of "Eastern States Retail Lumber Dealers' Association, Minutes of Meetings of the, *Before* and after its information as such, Articles of Association and Incorporation, and Minutes of Directors' Meetings." (Italics are ours.) This exhibit was introduced at page 7 of the Record, Vol. II, as a "Package consisting of 107 typewritten pages." As a matter of fact, the so-called declaration of principles is one of a meeting of "The Eastern Associations" held at a date a year prior to the formation of the Philadelphia Association, and several months prior to the adoption of the by-laws of the incorporated Eastern States Retail Lumber Dealers' Association. It may be that these resolutions were adopted at about the same time that the charter of the new incorporated association was signed, but in no case were any such declarations of principles

embodied in the charter or by-laws of the new association. We may be permitted to add that if they had been, the Philadelphia Association would never have become a member thereof. The questions of past occurrences we have discussed in Point IV of our main brief (pp. 55-60); and we commented at page 59 of our brief upon the reference to counsel, at the time of the formation of the Eastern States Retail Lumber Dealers' Association, of objects which were deemed questionable, and of the results of the omission of those objects as part of the business of the new association.

We take it for granted that the learned counsel who has written the Government's brief has not intended to mislead any one, but there should be no misunderstanding upon this subject.

The next sub-division of the Government's brief, namely, that relating to the compilation and circulation of the lists, begs the question that we are here discussing. One confesses to a sense of irritation at having these lists called "Black Lists" so continuously by the Government, but that somewhat human topic we have treated at pages 41 to 43 of our brief and do not feel it necessary to go into it further. The so-called "similar provisions" of the Philadelphia Association to that of Massachusetts, referred to at pages 15 and 16 of the Government's brief, are Article VII of its by-laws, Record, Vol. IV, p. 367. But that article is not "similar" in important respects, or in effect.

The next subdivision (at page 18 of the brief) gives

a series of references to the record under a sub-heading of "The actual course of conduct of defendants in concertedly withdrawing their patronage from listed wholesalers." The introductory paragraph to these citations is obviously intended to make the Court believe that here is evidence of that meeting of minds together among retailers, and that concert of action, pursuant to some agreement, express or implied, that would constitute a combination of action which, if illegal, would amount to a conspiracy. Upon going to the record, the Court will find nothing of the sort, but merely instances of the experience of men who are on the lists in seeking to sell lumber to this, that and the other retailer. We ask the Court to examine the testimony at the points there suggested. In none of them, so far as we have had time to examine them, is the testimony directed to proof of an *agreement* to conspire. Certainly this is true so far as any testimony that has to do with the Philadelphia Association or any of its members is concerned. Of course we recognize that the proof of an agreement to conspire may be that of direct evidence or of circumstantial evidence; but, with reference to circumstantial evidence, proof of a course of action that might have been the result of a previous agreement, or *equally might have been the result of natural instincts of a number of individuals,* is no proof of any such prior conspiracy. As Starkie on Evidence well says (10th Am. Ed., p. 862): "It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved." And, in point of fact, we say, and we reiterate

it with such force as we can command, there was no such conspiracy or combination in which the Philadelphia Association was concerned, and there is nothing in the record that could show it.

The first time that the names of the Philadelphians are particularly mentioned in this connection is at the top of page 19. Referring to the instance of the witness Strock, they say that "he was boycotted in Philadelphia also," and refer the Court to page 258 of Volume II of the Record. This observation that Strock "was boycotted in Philadelphia" is also repeated in terms at page 28 of the brief. So as to show that the testimony totally fails to bear out the statement in the brief, we quote it here in full, the connection beginning at the bottom of page 257 of the record and going to the conclusion of Mr. Brophy's examination of the witness at page 259:

"*By Mr. Brophy:*

Q. You said on your direct examination that you have done no business with Philadelphia concerns, did you not? A. No, sir, that we had committed no offense in Philadelphia. I think that was the question asked me. That is no offense against the Association in Philadelphia by selling to a small contractor or some such person for which we had been complained of, but we do business in Philadelphia and Camden.

Q. You have no complaint, therefore, from the Philadelphia Association? A. Not so far as I know.

Q. Have you ever seen the By-laws and the Constitution of the Philadelphia Association? A. Not that I remember. I think I have too in the reports of the Lumber Trade Journal and Review; they

generally give a synopsis at least, if not the by-laws, in either of these different Associations and reports of their meetings, etc., and I usually read them as a matter of news, but not with any particular bearing they will have in our business, because we were independent of it.

Q. But all the business you did in Philadelphia, your company, was done in pursuance of the rules of the Association as you understood them? A. We paid no attention to the rules; we sold the purchasing agents of the railroads there and a great many of the large yards who would buy from us, but without reference to rules or no rules. We never paid any attention whatever to any rules of any Association. We never tried to do anything which would violate it particularly, nor to keep away from it. We felt that we had one line of trade that we could go after; if it interfered at any time in exceptional cases with the Association we were sorry, but still it was our game and we went for it and got it if we could.

Q. So far as you know you never lost any business in Philadelphia, did you? A. There are certain yards in Philadelphia who have never bought of us, so far as I can remember, and we have always laid it to that. We have laid the same cause to other territory, other places, being a general business over a general territory we have never been able to see why we could not sell to any man who was buying lumber if our price was right and our lumber right, because we were a good firm and our people were strong enough to sell what they sold, but when a firm would not give us a schedule or give us an order when we knew our price was right, it always seemed to us there must be some motive other than what they gave us.

Q. But you never had any complaint made to you about parties in Philadelphia? A. Not to my memory.

Q. So that what you say now is simply a matter of speculation on your part? A. Well, yes, but at the same time. When you examine Mr. Lewis and Granger you may find they sold more in the Philadelphia market than I did. I am only speaking now of this office.

Q. As far as you know you know nothing about that? A. No."

After that our learned associate, Mr. Cruikshank, took up the re-cross-examination; and, with that zeal of combat which he showed throughout in dealing with the man he called a "scalper," and for whom he had such undisguised dislike, he asked this question of the witness (see bottom of page 261):

"Q. You know perfectly well that these Philadelphia people, if they knew what you were doing here, would refuse to buy from you?"

The answer, from the Government's own witness, was not in the least an admission. The witness replied:

"A. No, not from that cause, as I said a moment ago. We have sold to members of the Association in every one of these associations, members who wouldn't want it known, but members nevertheless. Those members are reasonable enough or avaricious enough, whatever you call it, to buy it from us and to pay us, if our quality is right.

Q. Where did you make such sales? A. New York, New Jersey, New England.

Q. To what extent; large or small extent? A. Always large, because we didn't deal with small concerns.

Q. So, notwithstanding this list, these people buy of you knowing you are on the list? A. Yes, some of them.

Q. And some people refuse? A. Yes, a lot of them."

The witness in support of the Government's claim of boycott whose testimony is quoted at greater length than any other in the Government's brief, is Mr. Threlkeld. He has second place in the list at page 18, and the quotation from his testimony occupies the greater part of pages 32 and 33. He is described at the bottom of page 31 as the "*Testimony of Threlkeld, a wholesaler*, boycotted in New York and put out of business (2 R., 217)". If this statement in the Government's brief was to be considered half way fair in describing the testimony it cites, at any rate it should be taken in connection with Mr. Threlkeld's further examination in rebuttal. By that time surely the phœnix had arisen from the ashes, as he states (Vol. III, p. 586) :

"A. I have just completed a contract for 900,000 feet of flooring that went into the Larkin Warehouse at Buffalo, every foot of which flooring was delivered on time, and not before time or after the time either. I have just completed a contract with the Endicott-Johnson Company at Lestershire, New York, for 600,000 feet of flooring, and every foot of that flooring is delivered exactly on time. Now, I will say that all of the Endicott-Johnson flooring was delivered by my firm, about 500,000 feet of the Larkin's flooring was delivered by my firm, and I think we delivered 150,000 feet additional, the remainder being got out by the contractor at Buffalo. I will state that we are delivering every week to the builders in New York City in quantities ranging from 20,000 feet up to 300,000 feet, to the builders, according to the quantity re-

quired at the building and never fall down. Of course not."

The conclusion of this sub-division of the point (at the bottom of page 20 of the brief) brings up the argument of law that we have already treated in our main brief and at the outset of this present point. There is, however, one observation as to a fact, namely that about "elaborate associations." In that connection we refer again to what we said in our main brief (p. 59), and to the evidence there appearing. The Philadelphia Association had some forty retail lumber dealers who paid annual dues of the large sum of $10 apiece. It might also be added that under Article X. of the by-laws of the Eastern States Retail Lumber Dealers' Association (Vol. IV of the Record, p. 38), each local association was expected to contribute $10 apiece to make up its annual expenses, or, in other words, the expense of the latter association was $100 a year. The epithet of "elaborate associations" seems scarcely fair.

Finally, in the order of evidence adduced by the Government, is that in sub-division 4 (p. 21 of the brief), as to "Admissions of members of defendant associations and other testimony showing general recognition of and obedience to a tacit or moral obligation upon members so to withdraw their patronage." The opening sentence under this heading combats directly the point that we made at page 38 of our brief, that the essence of the reason for the lists was protection against that kind of competition which was secret. We have examined the three citations from the testimony imme-

diately given at that point. That of the witness Reilly and the witness Johnston, has, so far as we can discover, nothing to do with the particular question there discussed. The testimony of the witness Steeves at the particular page mentioned has nothing to do with the question here discussed, but Steeves' testimony is referred to again in substantially this same connection at page 59 of the Government's brief (and again at p. 67); and is there (p. 59) partially quoted, but in such a manner as to make it appear on the face of the brief almost the opposite of what it is in the record. Turning (as we may conveniently in this connection) to page 59 of the Government's brief, we find this statement made in the brief:

> "Wholesalers, as a rule, did not attempt to conceal their sales to consumers. They could not have done so had they desired. The witness, Steeves, called by the defense, makes this clear (9 R., 117, 118)."

If the Court will be good enough to read that part of Steeves testimony which is quoted in the Government's brief, and then that which immediately follows, concluding the episode in the record, but without which the extract in the Government's brief gives an entirely erroneous impression, there will be needed no further comment from us (p. 118, Vol. IX):

> "Q. The list don't help you in that respect then? A. Why, it might help us; everything helps.
>
> Q. In that particular respect, you know that without the list, don't you? A. Not always.
>
> Q. How would the list tell you then any more about that than you know yourself? A. Well, it

might tell me what I didn't know myself and it might tell me what I did know myself.

Q. With respect to your own business, with your own custom? A. That is one way I might find out.

Q. Who in reality would report that except yourself? A. Anybody else might and we might report it.

Q. I am talking about a case where you had supplied the contractor and builder with supplies a long time, and the wholesaler should come along and take it away from you and sell to him? A. Yes.

Q. Now, isn't it the regular process for you to report that thing to your secretary yourself? A. If I was the first man who found it out who it was I would probably.

Q. In other words, somebody else might report it to the secretary? A. Very likely.

Q. You would report it to the secretary yourself if you heard of a wholesaler selling some other retailer's customer, wouldn't you? A. I probably would.

Q. I see; so that then the collection of the information and publication and the issuance and the receipt of this list is really for the purpose, isn't it, of finding out what wholesalers are selling the other retailers' customers? A. No, it is really for the protection of myself, when you come to the end of the matter.

Q. I see, all that the protection really consists of is just this, that you are thereby able to find out what wholesalers are selling consumers in your territory covered by the Eastern States Retail Lumber Dealers' Association, isn't that a fact? A. How is that now?

Q. I say that by the operation of this list you are able to find out what wholesalers are selling consumers in any of the territory covered by the Eastern States Retail Lumber Dealers' Association? A. I I am enabled to find out what wholesalers are mak-

ing it their business to sell consumers; I am able to find out what wholesalers are competitors of mine.

Q. Aren't you also thereby enabled to find out what wholesalers are competitors with all retailers covering this section I have just named? A. Perhaps, yes.

Q. Isn't that the real value of the list? A. That is the value of the list, to find out who we are competing with.

Q. Not with you, for the reason that a wholesaler might confine himself to the yards in New York and sell a contractor in Philadelphia or Springfield, Massachusetts? A. Yes, and then again they might not.

Q. Do you sell in Springfield, Massachusetts? A. Yes, if I can.

Q. Have you ever done so? A. Yes.

Q. Have you ever sold in Boston? A. No, I don't remember selling in Boston.

Q. Providence? A. Yes, I have sold some in Providence.

Q. You have sold in Philadelphia? A. I don't remember selling anything in Philadelphia.

Q. Take Philadelphia then, where you don't sell at all, the wholesaler sells a retailer down there, the objection is entered on the list; is it just as effective as far as your business with him is concerned? A. If it would be effective at all it would be.

Q. You would not buy from him, would you? A. I don't say that; I buy from lots of people on the list."

The witness then goes on to name a number of concerns on the list from whom he, a retailer, bought lumber notwithstanding that they were on the lists.

The balance of sub-division 4 of the Government's brief is taken up with a reiteration of the so-called testi-

mony as to a boycott, which we have dealt with immediately above; also with an extract from Mr. Cruikshank's brief, and with an argument regarding the circulation of the lists through the more extended territories covered by the nine or ten associations.

So far as the extract from Mr. Cruikshank's brief is concerned: We must, with all due respect to him, emphatically repudiate any such admission as this extract contains. We understand perfectly the feeling that Mr. Cruikshank has toward these so-called wholesalers that he denominates as scalpers, and we sympathize with him in his efforts to make the Court share that feeling; but evidence is evidence, and the record shows no such "informal pledges of mutual support and resistance," so far as this Philadelphia Association and is members are concerned, as he speaks of in his brief. We may be pardoned in saying, that while the clients represented by the undersigned counsel are not seeking to claim any exceptional purity, we distinctly decline to stand for the over zealous (and entirely individual) actions of one or two of the enormous body of defendants in this case. We discussed that topic in full in Point V of our main brief, and there can be no doubt that any so-called "informal pledges of mutual support and resistance" were beyond anything that any member of this Philadelphia Association did, or authorized any one to do in his behalf. There is no evidence whatever bringing the Philadelphia Association into any such pledges, formal or informal, and we cannot make that point too emphatic.

The Government's insistence that the circulation of

these lists, territorially speaking, was too wide, is answered by the fact that the territory was no wider than the one zone of trade. If our contentions be correct, that the lists were a proper protective measure to discover who a man's competitors were, then it was proper to place upon the lists the names of men who had the same zone of trade as the acknowledged retailers. We have already quoted in another connection the testimony of Mr. Steeves. It is pertinent upon this point. Mr. Maule, the Secretary of the Philadelphia Association, gave testimony also upon the point (Vol. X, pp. 237-238).

> "Q. What point is there for you people in Philadelphia in hearing how business is being done, for instance, in Massachusetts? A. For the simple reason that a wholesaler's territory covers practically the whole United States, and if they sell consuming trade in Massachusetts or Rhode Island, there is no reason why they should not sell the consuming trade in Philadelphia.
>
> Q. A man who may be doing the business there one day may be doing the business in Philadelphia the next day? A. That is the wholesaler's territory; the whole country.
>
> Q. You want to know—— A. We want to know where our competition lies."

Mr. MacBride, the President of the Philadelphia Association, testified to the same effect (Vol. X, pp. 261-262).

> "Q. Will you tell me the point of having on this official list wholesalers who are conducting what are considered retail transactions, for instance, in Massachusetts, when they have not as yet done so in Philadelphia? A. Because that wholesaler may

> come at any time into Philadelphia to sell at wholesale, and we would want our members to be informed that this was a man who was likely to compete with them in their business."

The above testimony is not startling, but merely common sense; and it illustrates the propriety of circulating these lists as broadly territorially as the trade affected. It would seem malicious to publish in America the doings of a lumber merchant in Europe; but that is precisely because of the great improbability that that lumber merchant would ever have any trade in this country. When a lumber merchant is likely at any time to enter the same sphere of business territorially speaking as the Philadelphia Association, then it becomes a perfectly proper protective measure for the Philadelphia Association to have at hand the knowledge of what the nature of that man's business is.

The last sub-division of this point of the Government's brief refers to discussions of evidence in certain cases where a conspiracy has been held to be established; notably that of *State* vs. *Adams Lumber Co.*, 81 Neb., 392. There is nothing more unsafe than citing a legal precedent upon a point of *fact*. We do not know all of the evidence in that Nebraska case, nor whether it is all referred to in the opinion of the Court. An authority of the highest Court of any State will doubtless be regarded with great respect by this Court, but we are speaking of authorities upon points of law. In this instance the Government is asking this Court to find, as a fact, that upon the evidence in these ten

volumes of the record, there was a conspiracy to refuse to deal with certain lumber merchants. Obviously that is to be determined from this record, and not because some other Court found upon some other record that there was such a conspiracy.

Point II of the Government's brief is devoted to citation of authorities and reasoning tending to show that *if* the boycotting combination exists, as is claimed in Point I of the Government's brief, then it is a violation of the Sherman Act. Inasmuch as we claim the premise of the Government to be directly contrary to the record, it does not behoove us to spend much time upon this point. We do, however, refer the Court again to what we said about the law of boycotts in the latter part of Point III of our main brief (pp. 50-55).

We should add that we are at a loss to understand how the Government works out a claim of, what is technically termed in the *Buck Stove* case, a secondary boycott. If there were a combination among retailers to refuse to deal with anybody on the lists, it would, it seems to us, be a defensive combination, or "primary boycott" coming into play only in the protection of the dealer who might otherwise have bought lumber from the assumed wholesaler. There is not even a claim, so far as we understand, that any consumer of lumber was at any time requested to refrain from buying from wholesalers on the lists, or that any coercive pressure was brought to bear upon *consumers* to accomplish such a result.

(*d*)

Inasmuch as an inspection of the record in this litigation has been thus invited on the part of the Government, and extracts from the record have been made in the Government's brief, we will here subjoin the *affirmative proof* that appears in the record in behalf of these Philadelphia defendants to the effect that there was no such conspiracy as is claimed. We referred to these pages of the record at page 15 of our main brief, but in view of the nature of the respondent's brief, we desire to place this testimony directly before the Court in our own.

Mr. Maule, the Secretary of the Philadelphia Association, was the first witness examined in behalf of that Association. The effort of his counsel was then being directed affirmatively to controvert the charge of the Government—although the same was entirely unsupported by proof—that the declaration of purposes and articles of association of this Philadelphia Association were a mere cover for a combination to refuse to deal with lumber merchants whose names appeared on these lists. In that connection Mr. Maule was asked as follows (Vol. X, pp. 229, 230):

> "Q. * * * I want to call your attention to some of the matters that are contained in the declaration of purposes. Your association starts by saying that we realize the convenience, if not necessity, of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business. What is

the convenience, if not necessity, of the retail lumber man in the community? A. The retail lumber yard carries a stock, as I said before, suitable for erection, where a buyer can come and look over the stock and see what he buys. He can have that stock selected to suit his purposes and in case of break down in a large factory he can get immediate delivery so that his business will not be tied up, whereas if he bought from further away he would have to wait for delivery and conveniences of that kind.

Q. I suppose then that would include deliveries in as small lots as he may need? A. From a board to any quantity.

Q. Then, too, there are the conveniences of having it handled directly to the consumer locally? A. The convenience he has of having it placed exactly where he wants and saving him that time and labor.

Q. The establishment of lumber yards in this country, is of long date, isn't it? A. We have been in existence I guess over 110 years; about 110 years.

Q. You mean your particular concern? A. Yes.

Q. And from your knowledge of the lumber business you would say, would you not, that this so-called retail lumber business is more of a wholesale and retail combined, with the distinguishing feature which is the yard, as the main difference, that has existed for a long time in this country? A. Indefinite as far as I know. We have always had to have the lumber yard.

Q. Your own concern you say has been in business for 100 years? A. I am the third generation."

After Mr. Maule had thus defined a retail lumber dealer and qualified himself as an expert to express his views (and had also called attention with pardonable

pride, to the fact that his firm was almost as old as the Constitution), he was asked as follows (pp. 230-234):

"Q. You go on next to say: 'We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market to whatever purchaser and at whatever prices they may see fit.' Let me ask you what have you personally done, either as an individual or as an officer of this association in the way of limiting the market of any manufacturer or wholesale dealer, or limiting his scope of purchasers, or limiting the price at which any such person should sell? A. We have never done anything of that kind in any manner or form.

Q. Have you ever heard of such things being done in Philadelphia? A. Never have.

Q. Or by any member of your Association? A. By anybody in the retail lumber business in Philadelphia—or member.

Q. Has there ever been any conferences among the members of your association as to the prices at which wholesalers or manufacturers should sell or be permitted to sell? A. None whatever.

Q. You go on to say: 'We also recognized the disastrous consequences which result to the legitimate retail lumber dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competitor, where any exists.' I notice that in the declaration of purposes and in Article 7 of your articles of association there is a series of directions for reports on the part of members of the Association who have knowledge of such sales to you, and regulations as to what you shall do with respect to verifying the report. Let me ask you in connection with that declaration of purposes and that Article 7 of your articles of association what method has your

Association taken to secure information as to what these so-called wholesalers were doing with respect to selling direct to your own customers? A. I would receive a written communication from a a member stating or saying that a certain wholesaler or lumber dealer had sold lumber to consumers, asking me to take up with the lumber dealer in question his position in the trade, whether he was a wholesaler or a retail lumber dealer. He also stated whatever facts that he had in the case in the communication to me and I would then write to the lumber dealer in question and ask him whether—I have a form letter, which is practically the same letter I have written for a number of years.

Q. Do you allude as a form to, for instance, that letter which has already been offered in evidence here of Boyce & Grogan Lumber Company? A. This is the letter that I sent to the lumber dealer.

Q. Read it right into the Record (Referring to Petitioner's Exhibit No. 184). A. (Reading) 'There has been filed in this office a report to the effect that you are selling lumber direct to the consumer. Is this report correct? In replying you will kindly favor us with a statement as to the relation which you sustain to the trade? Are you strictly wholesale lumber dealers? A reply at your convenience would be appreciated. I remain.'

Q. I take it that the ordinary source of supply that you and other retail lumber dealers in Philadelphia have is through wholesalers or different manufacturers, isn't that so? A. Wholesalers and manufacturers.

Q. So one of these men to whom you are writing this form of letter would be the kind of a man from whom you would be apt to be buying your own lumber? A. Yes.

Q. So that therefore it seems that your enquiry was directed to find out whether the man from whom

you were buying your lumber was selling to your own customer, is that it? A. That is the case exactly.

Mr. McKercher.—Hadn't we better let the witness testify.

Mr. Taylor.—I think Mr. McKercher's suggestion as to the witness testifying is quite correct.

Q. Now will you state that yourself? A. I would like to have the information from the wholesaler as to what position he held in the trade, as I personally am in the lumber business, and would like to have the information, together with the members, as a member of the Association.

Q. Then, to go on with the course of business in one of these enquiries, what would next happen after you wrote a letter of this kind? A. The facts would either be denied or verified by the wholesaler replying to me. After we would get the correspondence—after I would get the correspondence—it would be returned to the member making the report, and if he wanted to he could return it to me asking me to place it before the association. In a great many cases it died a natural death, never heard anything more of it.

Q. That is to say the member—— A. Was satisfied with the explanation or whatever was in the correspondence. He never cared to go any further. I finished my duty.

Q. Then if he sent it back to you for report to the association, what next happened? A. It was my duty to place it before the association and the correspondence was read before the association, and if the facts were correct I was ordered to inform our members in the usual way.

Q. Now, then, assuming that this wholesaler was doing a retail lumber business in this instance, and the association ordered you to inform your members, what did you then do? A. I informed the members on our official statement.

Q. Have you a copy of that statement? I show you Petitioner's Exhibit No. 175. A. That is the statement of Philadelphia.

Q. Have you made a computation as to how many of these enquiries, as to the nature of the man's business have been made of you by different members of your association since 1903, when the association was organized? A. The names that have come before the association amount to 47, if my computation is correct. I went over it carefully and figured 47.

Q. Are you sure that your computation is correct within three or four? A. Absolutely.

Q. It certainly would not be so many as 60? A. It would be less than that.

Q. Then, with reference to the 47, how many have been placed upon your list? A. 17.

Q. That is during the 9 years? A. That is since 1903.

Q. What was the result of placing a man who had heretofore been considered a wholesaler upon one of your lists? A. I really don't know of any result. The information was given to our members and that is as far as we knew. We fulfilled our duty.

Q. Was any further action taken with reference to the matter? A. No further action at all.

Q. In any instance? A. Nothing whatever was done; it was finished.

Q. Do you know of any rule in writing or in spirit connected with the Philadelphia Association as to what action should be taken by its members when a man was on that list? A. There never has been any rule or any talk of any kind.

Q. Was there any custom? A. No custom.

Q. Or any common understanding? A. Nothing in fact whatever in that respect.

Q. Do your members buy their lumber from men

on those lists after their names have been placed there? A. A large number of them do.

Mr. McKercher.—Objected to unless he states how he knows. He is testifying now from pure hearsay. I object to that unless he develops his certain knowledge of it.

The Witness.—The reason I say that is because I have been told by our members and I have every reason to believe they are telling the truth.

Mr. Taylor.—We will have, Mr. McKercher, several men here who made a practice of making their purchases in that way when it was to their interest so to do.

Q. Is it the habit in Philadelphia amongst lumber dealers like yourself to inform each other as to the sources of supply of each one of you? A. No, sir, we do not; it would not be good business policy.

Q. Has there been any boycott, practical or moral, directed against any member of your association who bought from people on that list? A. I say positively no."

Without undertaking to quote at length from the cross-examination of Mr. Maule, we may with confidence assert that there was no effort to impeach his testimony in respect to the above matters.

Mr. Maule was followed by Mr. McBride, the President of the Philadelphia Association, and one of its delegates in the Eastern States Retail Lumber Dealers' Association. Mr. McBride (at p. 258) testified as follows:

"Q. You are familiar with the custom, I take it, of sending out these so-called official lists. A. I am.

Q. Of people who say that they are wholesalers and

whom you denominate as retailers for selling to consumers. What is the result of a man being on that list? A. Practical result?

Q. The practical result? A. The practical result of a man being on that list was to the effect that the retail dealers knew who among the wholesalers he found were retailers.

Q. Is there any rule or regulation in Philadelphia as to what any particular retailer should do in view of a man's being on that list? A. None whatever. I have repeatedly told the members that this list was to them like a newspaper or a trade journal; the man who represented himself as a wholesaler and sold as a retailer was not acting fairly and we felt that our members had a right to know that that man was not doing what he claimed to do, and we wanted them to know who their competitors were.

Q. Suppose a man was on that list, did members of your association buy from him? A. They did.

Q. Have you ever bought from a man on the list? A. I have.

Q. Has your action in that regard been visited by disapproval on the part of your fellow-members? A. No; nor by any criticism whatever.

Q. Have you ever had any criticism of any kind for your conduct in that respect? A. I have often met the retailers and I have never heard any criticism of any kind either for buying from the—I have never heard any criticism of any kind for buying from those who might be mentioned upon that list."

There was no attempt to impeach Mr. McBride's testimony upon any cross-examination.

The testimony of Mr. Chesnut was to the same effect (p. 272), and so that of Mr. Lloyd (pp. 279–280); these latter two gentlemen being probably the largest lumber dealers in Philadelphia. We ask especial attention to what Mr. Lloyd said as to the importance of the lists.

In the brief submitted in behalf of the Government below there were several letters insisted upon as evidence of this combination to refuse to deal, that were written by Mr. Maule. Reference to them has been omitted from the Government's brief here, but we ourselves desire to lay them before the Court. A typical one appears at page 490 of Volume IV of the Record, and is as follows:

"THE RETAIL LUMBERMEN'S ASSOCIATION OF PHILADELPHIA.

2500 South Street.

PHILADELPHIA, May 24th, 1904.

JAMES M. REILLY, Sec'y.,
Newark, N. J.

Dear Sir—Your report No. 93 received. I notice that the name of Eli B. Hallowell & Company has been removed from the report.

Would say that the members of this Association still consider them in the same business as themselves on account of their having sold the consumer in this territory.

I remain,
Yours very truly,
(Signed), CHAS. P. MAULE,
Secretary."

And finally we call attention to this further extract from Mr. Maule's testimony (pp. 235-236):

"Q. Now, going on with your articles of association, I observe in article 3 the statement of limitations and restrictions under Section 1 and you say 'no rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting productions, restraining trade, regulating prices or pooling

prices.' Have any such rules, regulations or by-laws been adopted by your association? A. None whatever, in any way; nothing of that kind was ever taken up.

Q. In Section 2 you state: 'No coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the association, or to buy or refrain from buying from any particular manufacturer, wholesaler, or either of their agents. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of the association; or to induce or persuade him to become such member.' Section 3 states: 'No promises or agreements of any kind shall be requisite to membership in this association, nor shall any penalties be imposed upon its members for any cause whatever.' Let me ask you first have you ever taken any coercive measures or has your association taken any coercive measures of any kind towards any retailer with respect to his conduct? A. We have never, and the membership has been entirely voluntary. We have asked no obligations of any member of the association.

Q. Have you ever exacted any penalties? A. None whatever.

Q. I observe that in article 4 you state that the dues are $10 apiece, payable in advance; how much of a fund has that created to your association per annum? A. Our largest membership has been 42; our membership to-day is 39; that would average an income of about $400.

Q. Until the institution of this extraordinary, inequitable and expensive litigation, has your association ever collected any further amounts than represented by this $10 apiece? A. We never have. We might go out at the end of the year with a small balance, but not very large.

Q. So that your income or outlay—— A. Our outlay has has been the secretary's salary.

Q, How much is your salary? A. Salary, $150. We donated a golf club to the Lumberman's Golf Association. We had enough to do that with and printing and postage has eaten up the balance.

Q. It has never amounted to as high as $600 a year until this action was commenced, has it? A. No, sir."

(*e*)

In Conclusion.

Upon this discussion of the record: We submit that the testimony fails to disclose evidence, direct or circumstantial, of a combination of these defendants to refuse to buy lumber from any lumber merchant. If there be such a combination existing, it is certainly not a combination to which the defendants members of the Philadelphia Association are parties. We further submit that the record affirmatively shows that the members of the Philadelphia Association are *not* parties to any such combination, and that their testimony to that effect is uncontradicted.

Such being the case, the first and second points in the Government's brief, pages 10 to 55, are immaterial, and the question comes back to the correctness of the views of the Circuit Judges below.

II.

One or two observations with reference to Points III and IV of the Government's Brief.

These points we shall not go into at any length, because our main brief and the opening observations, preliminary to the discussion of the evidence, in Point I of this reply brief, attempt fully to cover the ground. It occurs to us only to note one or two matters in this connection.

The extract from Mr. Cruikshank's brief given at the bottom of page 56 and top of page 57 of the Government's brief, is scarcely fair in that it is not fully given. At any rate, we respectfully decline to be bound by that argument. We do accept, in substance, the facts found by the District Court, as stated at the top of page 57 of the Government's brief, but fail to see the connection between that and the extract from Mr. Cruikshank's brief.

At page 59 of the Government's brief, the Government's counsel again takes issue with our point (p. 38 of our brief), that the essence of the reason for the lists was protection against secret competition. Again in this connection we call attention to the fact, that the extract from the testimony of the witness Steeves, as there set forth, does not give the purport of his testimony as it appears in the record, where he answered the last question quoted: "No, I don't care anything about

it." In response to the next question he showed that he misunderstood the previous one, and he went on and made his meaning and testimony perfectly clear, as we have shown through the lengthy quotation in the first point of this brief.

The observations in the next two pages bring up one suggestion which ought to have been made in our main brief; and that is, that the impression created by perhaps all of the counsel in this case and by the members of the Court below, is as if there was some cut and dried division of the lumber business into different classes, and some cut and dried effect that these lists had upon the lumber business. In point of fact, some witnesses differed from others as to what the natural classes of the trade were. There was a vast difference in opinion as to what was proper trade ethics for different members of the trade. In these very associations there was a difference of membership, some of them, such as New York and the District of Columbia, including wholesale lumber dealers (see pp. 2 and 3 of the Government's brief), while others confined themselves to only the so-called retail lumber dealers. As to the effect of the lists, some people did not care whether they were on the lists, and others did. Some took one course of action on their account, and some another. If one were to go into all this evidence in great detail there would be a most indefinite feeling resulting in the minds of the Court, as to what lumber dealers really did think and do in the course of actual practice. But out of all this chaos there is one point quite reasonably clear, which is that

the circulation of these lists is a method of business which has been carried on for years, and which these defendants think to be necessary for their protection, and which their counsel think to be legal. It seems an exercise of somewhat paternalistic powers for the Department of Justice to insist that these people shall now carry on their business some other way. We say that there is a stronger burden imposed upon the Government in thus attempting to alter the practices of a *trade* than if it were attempting to alter the practices of a band of particular individuals.

Along in these concluding pages of the brief (60-63, 66, 67) there appear statements put as if they were facts, which, in reality, should have been phrased as arguments. This is to put it mildly on our part, because to us many of these statements seem diametrically *against* the facts from the record. Such a statement (p. 62) is that if these lists continue, consumers of lumber "could be compelled to pay retail instead of wholesale prices." A useless statement, because entirely academic on this record, is that "The elimination of unnecessary middlemen is one way of reducing prices" (p. 63). The learned counsel for the Government does not deign to notice our rehearsal of the *evidence*, at pages 43-45 of our brief, where the testimony cited *proves* that the only enhancement of prices is in the instance where the consumer requires yard service.

As long as they have been made, we cannot let these statements in the Government's brief pass without some quotation from the testimony. As we said, in speaking

of this in our main brief (pp. 43–45) the question of any indirect effect of these lists on prices in the lumber business ought not to have a legitimate bearing. At the same time, we realize that everyone wants to know whether the methods that do obtain in the business have been the cause of the enhancement of prices. We insist as vigorously as we may that the existence of these lists has had nothing to do with the course of prices. A statement (p. 62 of the Government's brief) that

> "The retail yard dealer must charge consumers from 20% to 25% more than he himself originally paid for the lumber"

is totally untrue when it applies to competition in carload lots. Counsel, indeed, impliedly admits this in the concluding sentence of page 5 of their brief. This increased amount is where a consumer requires the facilities of deliveries from the retailer's yard. Where there are no such facilities required, the retailer is constantly in competition with the wholesaler; and indeed at times the Government seems to criticize this very course.

The following was the testimony of Mr. MacBride upon this topic:

> "Q. I take it that in your business, Mr. McBride, you sell to your consumers sometimes from your yard and sometimes direct from the manufacturers' plants, without the lumber being handled through the yard, is that not so? A. Generally speaking there might be said to be three kinds of transactions in our business, the major part of our business is delivery by team from the yard; we have also a part of our business where we ship the lumber to the nearest railroad point direct from the mill and then deliver it where the man may want it.

Q. You mean you have the facilities of your yard? A. Yes; and number three is where a man buys the lumber delivered to him at the nearest siding and we have nothing to do with it; he pays the freight on the lumber and takes that from his settlement with us.

Q. Where you have not to use the facilities of your yard in any way, are you in competition with the wholesaler? A. We are in competition with wholesalers and other manufacturers who are working under the same conditions.

Q. On the question of prices in such instances how do your prices compare that you make to the consumer with the prices of the wholesalers? A. As we receive orders at times I judge we quote better prices than they do or wouldn't get them.

Q. Do you know of any restrictions on the right or power or ability of the wholesaler to go in full competition with you with respect to such sales? A. None whatever that I know of.

Q. Is there any understanding, or has there been within your memory, any understanding in Philadelphia with relation to the regulation of prices? A. No, sir, no.

Q. Is there any common understanding among all of you retailers? A. None whatever. If it was attempted I think it would last, maybe, until the door closed on their backs." (Vol. X, p. 259).

The following is the testimony of Mr. Chestnut:

"Q. Is there any general market quotation for different classes of lumber at any time in Philadelphia? A. No; I have seen quotations or lists of prices represented to be the price of the commodity; but that is not the price at which we sell, any of us; it is simply, I suppose, as a guide; I believe at one time it was gotten up by the Government.

Q. How do you fix your price at which you quote

any kind of lumber to a prospective customer? A. Based upon the cost of the lumber itself and the cost of doing business added to that.

Q. Then assume that there is no yard service to be rendered at all, assuming that you are making a delivery direct from the railroad to the consumer, then what affects the price? A. The cost of the lumber f.o.b. cars at the mill, and the freight added, and my profit.

Q. With whom do you come into competition with respect to those deliveries? A. The same people I mentioned before, everybody that is in the lumber business.

Q. Manufacturers or wholesalers? A. Manufacturer, wholesaler.

Q. And retailer? A. And down to the retailer.

Q. You have a number of sales of that kind, haven't you? A. The majority of the sales are of that nature.

Q. The majority of your sales are of that nature? A. Yes." (Vol. X, p. 273).

The following is the testimony of Mr. Lloyd:

"Q. Are all of your sales from your yard or do you make sales direct from the factory? A. Our principal sales are from our lumber yards, but we do also a large business for direct shipment from the mills. We also, of course, buy from the so-called wholesaler and from the millman and from the manufacturer. They are the three sources of supply, and the manufacturers' agent. A great many of the so-called wholesalers are really manufacturers' agents; that is, they have an office and represent some particular manufacturer.

Q. A wholesaler—I suppose you agree with the definition of the others—a wholesaler is a man without a yard? A. A wholesaler is a man without a yard.

Q. And without the facilities that go with that? A. Yes.

Q. In selling direct to consumers that utilize the facilities of your yard, with whom do you enter into competition? A. We come into competition with everybody in the lumber business and in position to furnish the material as quick as we are. In other words, our principal competitors would be the large wholesalers. You take most of the large manufacturing plants in Philadelphia, they have a regular fixed list which they send out to the yards, to quite a number of retail yards and wholesalers to bid on.

Q. You say the large manufacturers, you mean the manufacturing consumers? A. Manufacturing consumers like the Rapid Transit Company or the railroads in Philadelphia. They have a regular printed form which they send out to get bids, and you have to bid low or you don't get the business; and as we are able to get that business we know that we compete, and we often see the figures of other competitors.

Q. Are these lists sent out to these wholesalers too? A. They are sent out to wholesalers as well, probably to more wholesalers than to retailers.

Q. Of course, these bids that go out denominate where the delivery is to take place, don't they? A. Yes.

Q. And from that you are able to judge whether your yard facilities will be broad enough? A. The bids generally specify they must be shipped in a certain length of time and in some cases the wholesaler who is anxious to get the business will take a chance and quote for direct shipment, where we would quote for delivery from the yard stock because we knew we could not get it in on time.

Q. Does it make a difference in the price you quote as to whether you have your yard service called upon or not? A. It naturally does, because we have

a yard service and we have to figure in all of our regular fixed charges for that service. Where there is no yard service the price is sometimes lower than it is for the yard.

Q. Of course, you do not, in making your quotation, name different prices for yard service as such, but simply include it in the price at which you propose to sell the lumber? A. No; as a general rule we state the price either from the mill or f.o.b. from the yard; we sometimes give a price both ways.

Q. So much per foot or so much for yard services? A. No; so much per thousand feet." (Vol. X, pp. 277–278).

We have now referred so often to the testimony given by the witnesses adduced by the undersigned counsel, that we beg leave to add: In this enormous record it occupies but a small share, beginning in Volume X, at page 227 and ending, including all the exhibits, at page 290. That is the whole of it. We say again that to this testimony there is no contradiction. It covers all of the salient features of the case and so far as these Philadelphia defendants are concerned, we respectfully submit that it is conclusive.

Speaking of a phrase at page 63 of the Government's brief, we may be pardoned in saying that the light and gay atmosphere with which counsel surround their thought of these eliminated middlemen, is scarcely in keeping with the serious effect that this litigation may have if the decree below be sustained. These retail lumber merchants are of the opinion that the pres-

ence of secret competition in their midst, on the part of lumber merchants who have no yards, and of which they have no means of knowing, might result in such a ruinous war in the wilderness, that the result would be the elimination to a very great extent of the yardmen in the lumber business. As long as there are yardmen, and as long as some of them, like Mr. Maule, have had their lumber yards for upwards of one hundred years, they do not contemplate such a situation with equanimity. That is the reason why this appeal has been taken. The Court is dealing with very serious business rights. If the retail yardmen have to be eliminated as "unnecessary middlemen" it is at least a result which no one should view without great sympathy.

The Fourth point of the brief exhibits the Government's point of view towards certain cases which we have ourselves discussed in our own brief, continues with an argument (pp. 66-67) that would lead one to paraphrase, as an insistance that retailers should never compete with wholesalers, though an injunction is right so as to let wholesalers compete with retailers, and then concludes with a final and further reference to this testimony of Mr. Steeves, which we have already shown to be unfairly quoted.

III.

Upon the above brief, written in view of the Government's brief, and upon the main brief interposed by us in this case, we respectfully submit that the decree below should be reversed and the bill of the Government dismissed.

C. E. MORGAN,
HOWARD TAYLOR,
C. E. MORGAN, 3D,
CHARLES B. BROPHY,
Of Counsel for Philadelphia Retail Lumbermen's Association.